LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-4491

COOK & CO., INC.,
Petitioner,

VERSUS

CLAUDIATTE PIERCE, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Respondents,

COOK & CO., INC.,
Petitioner,

VERSUS

STEPHEN ELLENWOOD, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PAGE DOBSON, of the firm
RHODES, HIERONYMUS, HOLLOWAY & WILSON
2411 First National Center
Oklahoma City, Oklahoma 73102
405/235-8593

Counsel for Petitioner

September, 1975

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional, Statutory and Federal Rules Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
Argument	10
I. The Tenth Circuit improvidently usurped the discretionary authority of the trial court	10
II. The respondents failed to preserve any question for Rule 60(b) review	12
III. A change in judicial precedent is an insufficient basis for 60(b) relief from a final judgment	14
IV. The instant case presents no "extraordinary circumstance" justifying Rule 60(b)(6) relief	18
Conclusion	23

APPENDICES

Appendix A:	
Order of the United States District Court for Summary Judgment and Judgment	i-ii
Findings of Fact and Conclusions of Law	iii-xiv
Appendix B:	
Opinion of the United States Court of Appeals, 10th Circuit	xv-xxx

TABLE OF CONTENTS CONTINUED PAGE

Appendix C:

Supplemental Opinion of the United States Court of Appeals, 10th Circuit ..... xxxi-xliii

Appendix D:

Federal Rules of Civil Procedure, Rule 60(b) xliv

TABLE OF AUTHORITIES

CASES:

Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209 (1950) 8, 16, 19

Annat v. Beard (5th Cir. 1960), 277 F.2d 544 15

Bridonx v. Eastern Air Lines (App. D.C. 1954), 214 F.2d 207 11

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317 (1940) 17

Collins v. City of Wichita (10th Cir. 1958), 254 F.2d 837 15

Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 50 (1938) 8

First National Bank in Wichita v. Luther (10th Cir. 1955), 217 F.2d 262 13

Frank v. New Amsterdam Casualty Co. (E.D. Pa. 1961), 27 F.R.D. 258 14-15

Gondeck v. Pan American World Airways, Inc., 382 U.S. 25, 86 S.Ct. 153 (1965) 8, 18, 19

Hudgens v. Cook Industries, Inc., Okla., 521 P.2d 813 (1975) 6

Klapprott v. United States, 335 U.S. 601, 336 U.S. 942, 69 S.Ct. 384 (1949) 19

Lacke v. United States (S.D. N.Y. 1957), 21 F.R.D. 305 15

AUTHORITIES CONTINUED PAGE

Megardt v. Colonial American National Bank of Roanoke (App. D.C. 1944), 140 F.2d 701 12

Pierce, et al. v. Cook & Co., Inc. (10th Cir. 1970), 437 F.2d 1119 12-13

Polites v. United States, 364 U.S. 427, 81 S.Ct. 202 (1960) 16

Title v. United States (9th Cir. 1959), 263 F.2d 28, cert. den. 359 U.S. 989, 79 S.Ct. 1118 15

United States v. Cudd (10th Cir. 1974), 499 F.2d 1239 21

United States v. Oregon Lumber Co., 260 U.S. 290, 43 S.Ct. 100 (1922) 13

United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878) 22

Vaughn Wedel v. McGrath (D. N.J. 1951), 100 F. Supp. 434 aff'd (3rd Cir. 1952), 194 F.2d 1013 15

STATUTES:

28 U.S.C. 1254 (1) 2

28 U.S.C. 1332 3

49 U.S.C. 301, et seq. 4

MISCELLANEOUS:

15 AL.R. Fed. 193, et seq. 15

Federal Rules of Civil Procedure, Rule 56 ..... 4, 12

Federal Rules of Civil Procedure, Rule 60(b)5 6

Federal Rules of Civil Procedure, Rule 60(b)(6) 6, 7, 8 12, 15, 19, 20

7 Moore, Federal Practice, para. 60-27(1) p. 340 11

7 Moore, Federal Practice, para. 60.27(2) p. 359 17

Rules of the Supreme Court, Rule 19(b) 10, 22

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. ----------

COOK & CO., INC.,
Petitioner,

VERSUS

CLAUDIATTE PIERCE, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Respondents,

COOK & CO., INC.,
Petitioner,

VERSUS

STEPHEN ELLENWOOD, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cases on June 24, 1975.

OPINIONS BELOW

The unreported opinion of the District Court for the Western District of Oklahoma dated December 2, 1969, granting Summary Judgment together with Findings of Fact and Conclusions of Law in Claudiatte Pierce, et al. v. Cook & Co., Inc., are set forth as Appendix A.

The initial opinion of the Court of Appeals for the Tenth Circuit dated December 21, 1970, affirming the order granting Summary Judgment in Claudiattte Pierce, et al. v. Cook & Co., Inc. (10th Cir. 1970), 437 F.2d 1119, is set forth as Appendix B.

The opinion of the Court of Appeals for the Tenth Circuit upon rehearing *en banc* vacating its former order and remanding with directions in Claudiatte Pierce, et al. v. Cook & Co., Inc., 10th Cir., ... F.2d ..... (decided June 24, 1975), is set forth as Appendix C.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit to which this Petition is directed was made and entered on June 24, 1975. The judgment was issued following rehearing *en banc* which was granted from its former unpublished summary Order of January 23, 1973 (superseded by the appended judgment of June 24, 1975).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. The Tenth Circuit improvidently usurped the discretionary authority of the trial court.

II. The Respondents failed to preserve any question for Rule 60(b) review.

III. A change in judicial precedent is an insufficient basis for 60(b) relief from a final judgment.

IV. The instant case presents no "Extraordinary Circumstance" justifying Rule 60(b)6 relief.

CONSTITUTIONAL, STATUTORY AND FEDERAL RULES INVOLVED

The provisions of Rule 60(b), Federal Rules of Civil Procedure herein involved are set forth in Appendix D.

STATEMENT OF THE CASE

Three separate civil personal injury actions and a wrongful death action were filed arising from a common vehicular highway accident occurring in Canadian County, Oklahoma, on January 11, 1968. Teddy Joe Pierce, deceased, was the driver of an automobile which collided with a tractor-trailer which allegedly crossed the centerline of the roadway. Three minors injured in the Pierce vehicle brought suit together with the estate representative of the driver. Three of the suits, including both actions herein, were filed in the District Court of Kay County and thereafter duly removed to federal court upon diversity jurisdictional grounds (28 U.S.C. 1332).

All suits, including one originally filed in federal court, hereinafter called the "Davis" case, were consolidated before Honorable Luther B. Eubanks for discovery and pretrial proceedings. The actions were lodged against the Petitioner defendant, Cook & Co., Inc., hereinafter called "Cook," and a truck driver, John Lewis Edwards, who at the time of the accident was hauling a load of grain pursuant to a contract with Cook. Edwards, an independent contractor, is not involved in this Petition, the actions as to him having been voluntarily dismissed.

Following formal discovery, Cook filed a Motion for Summary Judgment pursuant to Rule 56, F.R. Civ. P., claiming that under Oklahoma common law no duty was owed to the public by a shipper of grain for negligent acts of an independent contractor transporting its commodities unless the acts were unlawful or inherently dangerous. The trial court agreed but before rendering judgment, the court offered to permit any desiring parties to dismiss their actions without prejudice, indicating an anticipated ruling adverse to them. Davis and a Terry Cook elected to and did dismiss their separate suits. The remaining plaintiffs, hereinafter referred to as Respondents Pierce (deceased) and Ellenwood (a minor), chose to accept a decision after changing their theory of recovery and urging that the liability of Cook should be determined in accordance with federal common law (the Motor Carrier Act, 49 U.S.C. 301, *et seq.*) and not by the law of Oklahoma.

On December 2, 1969, the trial court granted summary judgment in favor of Petitioner, holding that Oklahoma law did apply instead of federal common law and that in Okla-

homa a shipper had no duty to third persons for the negligent acts of an independent hauler (Edwards). It thereupon entered its Order for Summary Judgment and Judgment together with separate Findings of Fact and Conclusions of Law.

Pierce and Ellenwood perfected an appeal therefrom, claiming error in failing to apply federal common law. Respondents *conceded* they had no right to recover against Cook if Oklahoma law controlled and made no effort to reserve the question.

Upon appeal, the United States Court of Appeals for the Tenth Circuit by its Order and Opinion dated December 21, 1970, affirmed, holding that the issue of Cook's liability for Edwards' negligence was controlled by Oklahoma rather than by federal common law and that the trial court properly interpreted and applied the appropriate state law. The mandate issued on January 12, 1971, whereupon the judgments became final.

In the interim, the Davis case was refiled in state court following appointment of a non-resident guardian, thereby foreclosing federal diversity jurisdiction. The state trial court, subsequent to January, 1971, entered similar summary judgment for Cook which was appealed to the Oklahoma Supreme Court. That Court by its final opinion of May, 1974, reversed, overruled the precedent state authority on which the summary order turned, and remanded for jury trial, holding that where there is a foreseeable risk of harm to others unless precautions are taken, one regularly engaged in the hiring of motor carriers as an integral part of its business owes a duty to exercise reasonable care in

the selection of competent carriers. *Hudgens* v. *Cook Industries, Inc.*, Okla., 521 P.2d 813 (1975).

Subsequently, and in November, 1974, Pierce and Ellenwood, abandoning their only appellate position adversely determined, filed a joint motion to recall the mandates and vacate the final federal judgments, then almost four years old. For the first time they alleged the inconsistent and contrary position that Oklahoma common law indeed does apply. Their position upon the motion was that because the precedent authority interpreting Oklahoma common law was overturned in a related state case, their adverse judgments should be vacated and the causes remanded for jury trial. And though seeking relief under the provisions of Rule 60(b)(5), F.R. Civ. P., Rules for the District Courts, the motion was lodged in the Tenth Circuit.

The appellate court assumed jurisdiction and on January 23, 1975, issued its minute order granting Respondents' motion, recalling the final mandate, vacating its former opinion and judgment and remanding with instructions.

Upon application of Petitioner, Cook, the Circuit Court on March 27, 1975, granted rehearing *en banc*; but subsequently and on June 24, 1975, entered its divided opinion and order granting the motion pursuant to the provisions of Rule 60(b)(6), F.R. Civ. P. (*not* subparagraph (5) urged by Respondents). The appellate court justified its granting of Rule 60(b)(6) relief on the basis that an extraordinary situation was presented. That is the state decision changing judicial precedent (though issuing some 3½ years following the final federal judgments) was rendered

in the related Davis case; and that the relief "is appropriate to accomplish justice" in the diversity actions.

Its final judgment of December, 1970, was accordingly vacated and the case remanded with directions to the trial court to reconsider its former judgment of 1970 in light of the *Hudgens* opinion upon appropriate motion of Respondents now filed in the trial court. In such frame, the trial court has no choice but to reverse its former decree and assign the case for jury trial.

This Petition for Writ of Certiorari is lodged to prevent irreparable harm and prejudice to Petitioner where relitigation of matters finally concluded some years ago by final judgment has been mandated. The new substitute mandate has been stayed by the Tenth Circuit pending timely filing and disposition of this Petition.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit by its majority opinion of June 24, 1975, has summarily vacated final judgments in the companion actions entered over four years ago solely upon the basis of a post-judgment change of Oklahoma common law precedent upon which the cases turned. The appellate court found that because of some "unusual combination of events which have occurred" an extraordinary situation was presented justifying Rule 60(b)(6) F.R. Civ. P. relief. Just what was this combination of unusual events? No more and no less than the facts that these were diversity cases removed to federal court by Petitioner and that following adverse final judgments the state court precedent upon which the cases turned was reversed in a related case.

And solely upon this basis the appellate court:

(1) Disregarded the fact that the Motion for Rule 60(b) relief should be directed to the trial forum; accepted appellate jurisdiction and ordered relief granted, vacating its final judgment and recalling mandate;

(2) *Sua sponte*, granted relief under a provision of the Rule not raised or urged by Respondents in their motion and which was specifically disavowed upon oral argument;

(3) Failed to acknowledge that Respondents chose to remain in federal court rather than to dismiss and refile in state court with a similar stratagem to that utilized by Davis, preferring to perfect federal appellate remedies, interjecting a federal question;

(4) Refused to consider the fact that Respondents deliberately and through counsel elected and chose to appeal upon an inconsistent and unrelated theory of application of federal common law, abandoning reliance on state common law;

(5) Applied Rule 60(b)(6) relief retroactively affecting accrued rights of the parties, and unsettling a four-year-old final judgment without precedential authority whatsoever; but rather in direct conflict with all historical interpretation, truly "plowing new ground";

(6) Failed to recognize the criteria for Rule 60(b)(6) relief under this Court's decision of *Ackermann* v. *United States*, 340 U.S. 193, 71 S.Ct. 209 (1950);

(7) Misinterpreted the mandate of *Erie* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 50 (1938), which was in fact met when, upon appeal, the Tenth Circuit affirmed, finding that the

trial court had correctly applied the appropriate state common law to the case. Surely Oklahoma would not permit the vacation and reopening of a final judgment entered prior to reversal of the precedent on which the former case turned;

(8) And wreaked violence to the time-honored doctrine of finality of judgments.

The Petitioner cannot locate and the majority opinion below does not cite *any* judicial or historical precedent or authorities whatsoever for its action except for an unrelated decision of this Court in the case of *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25, 86 S.Ct. 153 (1965). There this Court did no more than require two different circuits to construe a federal statute the same way in a Longshoreman's case. *Gondeck* can be of no help or guidance in a Rule 60(b) diversity problem such as is presented here. We must concur with Chief Judge Lewis in his separate dissent in the instant case when he states:

> " * * * The majority appears to hold that divergent results from a common vehicular accident are, per se, grounds for relief under Rule 60(b)6, at least in diversity cases. If my interpretation of the intended impact of the majority ruling is correct then the court has indeed plowed new ground for no present authority supports such a rule. Federal judgments in common disaster diversity cases can then only be considered as dormant, not final, even though the case be the inverse of the one we here consider. A paid judgment would seem to be recoverable and resultant confusion inevitable."

Petitioner accordingly urges that the opinion and judgment of the Court of Appeals should be reviewed by

this Honorable Court pursuant to provisions of Rule 19(b), Supreme Court Rules in that:

1. The order vacating final judgment is in direct conflict with decisions of not only its own Circuit but of all other Courts of Appeals applying Rule 60(b) to cases involving change of state judicial precedent;

2. That an important question of federal law has been decided which has not been but should be settled by the Supreme Court; and

3. The Court of Appeals has so far departed from its accepted and the usual course of judicial proceedings and has so far sanctioned and directed such a departure by the lower court (directing its review of its prior order in light of the precedential change) as to call for the exercise of this Court's supervisory power.

A short further argument should aid in clarifying Petitioner's position.

I.

THE TENTH CIRCUIT IMPROVIDENTLY USURPED THE DISCRETIONARY AUTHORITY OF THE TRIAL COURT.

As recognized in their separate dissents below, both Chief Judge Lewis and Judge Seth observed that relief under the civil rule should be directed to the sound discretion of the trial court. But in this case the Court of Appeals to whom the original motion to vacate was directed has remanded to the trial court with "directions," thereby aborting discretion of that court through pre-decision. Hence, there has been a serious procedural defect in the

action of the appellate court in applying the motion to its "judgment," in deciding the issue fully and remanding the case. There is nothing for the trial court to decide in light of the direction for reconsideration in light of the recent *Hudgens* opinion except to reverse and assign the cases for trial upon the fact question of whether Cook exercised care in the selection of its independent hauler, Edwards. For some reason the Court of Appeals has chosen to invoke its prejudgment upon the trial court rather than merely to permit the filing of a 60(b) motion which is the only recognized appropriate procedure. As pointed out at 7 Moore, Federal Practice, para. 60-27(1) at page 340:

> " * * * Rule 60(b) states the basis for relief from a final judgment; and thus operates both as a grant and limitation upon the power of the *district court* to give relief from a final judgment." (Emphasis added.)

Miller than cites *Bridonx* v. *Eastern Air Lines* (App. D.C. 1954), 214 F.2d 207, 209, which states:

> "It has long been held in this jurisdiction that an application to vacate a judgment is addressed to the sound discretion of the trial court, the exercise of which will not be disturbed on appeal except for abuse (citing cases)."

By action of the Court of Appeals, the trial court was stripped of its discretionary power to consider and weigh the merits of any Rule 60(b) motion which might be filed with it. Its decision of whether a justifiable reason existed to relieve Respondents from a final Order has been prejudged.

II.

THE RESPONDENTS FAILED TO PRESERVE ANY QUESTION FOR RULE 60(b) REVIEW.

It is fundamental that summary judgment terminating a suit under Rule 56, F.R. Civ. P., is a final adjudication on the merits. *Megardt* v. *Colonial American National Bank of Roanoke* (App. D.C. 1944), 140 F.2d 701.

As pointed out in its Statement, Respondents initially appealed from an unfavorable summary judgment upon the sole proposition that federal common law applied, urging that the case should turn on the application of provisions of the Motor Carrier Act; and they specifically denied application of Oklahoma common law which they here urge as a basis for Rule 60(b)(6) relief. They did nothing to protect or preserve any issue of proper state law as it might be applied to the case. In its original opinion of *Pierce, et al.* v. *Cook & Co., Inc.* (10th Cir. 1970), 437 F.2d 1119, the Tenth Circuit recognized this fact and at page 1126 of its opinion noted, to-wit:

> "Plaintiffs do not assert they would have the right to recover against Cook if Oklahoma law controlled."

It then concluded:

> "We conclude that Cook did not violate any penal provision of the Motor Carrier Act or any penal regulations promulgated thereunder by the Interstate Commerce Commission, nor aid or abet Edwards in violating such a provision or regulation imposing penal sanctions on a carrier; and the issue of whether Cook was liable to Ellenwood for the negligence of Edwards is controlled by Oklahoma law.

"We hold that under Oklahoma law, Cook was not liable to either of the plaintiffs for the negligence or wrongful acts of Edwards.

"Affirmed."

The Tenth Circuit in the case of *First National Bank in Wichita* v. *Luther* (10th Cir. 1955), 217 F.2d 262, noted at its Syllabus Number 7 that where two modes of redress are available in a given situation but are so inconsistent that assertion of one amounts to a negation of the other, the deliberate choice of one, with knowledge or means of knowledge of such facts as would authorize resort to each, precludes the invoking of the other, on the grounds that there has been an "election of remedies."

This Court, in considering *res judicata* applications, recognizes that in asserting a choice of inconsistent claims for relief in a judicial proceeding, a litigant is precluded in subsequent litigation from advancing inconsistent claims. *United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 43 S.Ct. 100 (1922).

As noted by Circuit Judge Seth in his separate dissent in the instant proceedings:

"The appellants in the original case thought they could prevail on the issue of construction of a federal statute; they persisted in the federal courts after the defendants removed the case, and they lost in this court on the point they advanced. The other group of plaintiffs took the state route, overturned the theretofore prevailing state doctrine and won. The majority would here give the losing party a second bite at the apple."

Respondents having elected an inconsistent remedy upon appeal and urging for the first time the appropriateness of Oklahoma common law in their Rule 60(b) motion, how can the Tenth Circuit properly find this to be an "extraordinary situation" where 60(b) relief is appropriate to accomplish justice? Obviously, and as suggested by Judge Seth, the precedent on which Respondents' case actually turned, *i.e.*, application of the Motor Carrier Act, has not been reversed.

III.

A CHANGE IN JUDICIAL PRECEDENT IS AN INSUFFICIENT BASIS FOR 60(b) RELIEF FROM A FINAL JUDGMENT.

Although Respondents sought vacation of the final judgment under the provisions of Rule 60(b)(5), this authority was disregarded by the appellate court as these decisions were obviously not "based on" any prior judgment within the meaning of that paragraph. And though neither raised nor urged, and even specifically disavowed by Respondents, the court granted the relief under residual clause (6) of the Rule which provides:

> "Any other reason justifying relief from the operation of the judgment."

The courts, however, recognize that relief under such clause must be carefully and cautiously applied and require that the reason urged for relief must indeed be such as to justify it. It is reserved for only extraordinary circumstances required for the accomplishment of justice.

Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. *Frank* v. *New Amsterdam Casualty*

Co. (E.D. Pa. 1961), 27 F.R.D. 258. It is additionally recognized that even after decision on appeal, where an appeal is taken, a party may not ordinarily reopen a judgment under residual clause (6) to litigate a matter that either was or could have been litigated prior to or on the appeal. *Vaughn Wedel* v. *McGrath* (D. N.J. 1951), 100 F.Supp. 434, *aff'd* (3rd Cir. 1952), 194 F.2d 1013.

The federal courts, prior to this decision, have uniformly held that neither the fact that there has been a change in the state judicial view of applicable law expressed after a judgment has been entered nor the fact that a judgment is erroneous, nor the fact that the court may have made a mistake in law when entering judgment or that there may have been a judicial change in the court's view of the law after its entry, does not constitute "any other reason justifying relief" under Rule 60(b)(6). *Collins* v. *City of Wichita* (10th Cir. 1958), 254 F.2d 837.

See also *Title* v. *United States* (9th Cir. 1959), 263 F.2d 28, *cert. denied* 359 U.S. 989, 79 S.Ct. 1118; *Annat* v. *Beard* (5th Cir. 1960), 277 F.2d 544; and *Locke* v. *United States* (S.D. N.Y. 1957), 21 F.R.D. 305. Further see annotation at 15 A.L.R. Fed. 193, *et seq.*

In *Collins*, the case first reached the Court of Appeals upon an appeal involving the validity of a Kansas statute relating to notice in condemnation proceedings. The United States Supreme Court denied certiorari. A year later this Court determined the statute to be unconstitutional. Thereafter, the appellants filed a Rule 60(b) motion in the District Court which was overruled and an appeal was taken therefrom. In affirming, the Tenth Circuit itself in *Collins*,

citing *Ackermann* v. *United States, supra,* noted at page 839 of its opinion:

> " * * * A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief.
>
> * * * * * *
>
> "Litigation must end some time, and the fact that a court may have made a mistake in the law in entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside."

In commenting on *Collins*, Mr. Justice Brennan dissenting in *Polites* v. *United States*, 364 U.S. 427, 81 S.Ct. 202 (1960), which denied Rule 60(b) relief, properly rationalizes the rule, noting at page 210 of the opinion:

> "And in Collins v. City of Wichita * * * a modification of the judgment would have retroactively disturbed existing rights and financial reliance on the judgment.
>
> * * * * * *
>
> "The principle of finality is not offended by modification which disturbs no accrued rights and concerns only future conduct."

How can the instant case present a more "extraordinary situation" for relief than that presented in *Collins* where the appellant exhausted his appellate remedies and urged expressly on appeal the unconstitutionality of a statute subsequently held invalid by this Court? Surely Mr. Justice Brennan and the Tenth Circuit, prior to this decision, recognized that orderly settlement of disputes requires reliable finality of accrued rights.

Further, in discussing the effect of a change of circumstances on the doctrine of *res judicata*, this Court in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317 (1940, noted that the conclusive effect of a judgment as *res judicata* is not altered by the fact that the judgment was erroneous; and this is true even though the intervening change of a decision overruled a precedent on which the prior judgment was based. Finally, in 7 Moore, Federal Practice, para. 60.27(2) at page 359, it is recognized:

> "A fortiori, absent some practical inability to appeal, a change in the law does not affect the finality of a judgment, though it may afford a ground for relief from its prospective effect on motion under Rule 60(b)(5). This has been held to be so of decisions as to jurisdiction as well as those decided on the merits.
>
> " * * * The principles governing judgments entered after a trial generally should govern summary judgments, as the latter are dispositions on the merits in which the attack is normally upon the substantive correctness of the decision."

Obviously the present decision for review directs retroactive rather than prospective operation. It seriously affects the substantive rights and financial reliance of the Petitioner upon the finality of the four-year-old judgment. It summarily negates rights accrued long ago. The final judgment should be *res judicata* of itself.

IV.

THE INSTANT CASE PRESENTS NO "EXTRAORDINARY CIRCUMSTANCE" JUSTIFYING RULE 60(b)(6) RELIEF.

After recognizing that there was no precedent for this decision, Judge Breitenstein cited as authority the opinion of *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25, 86 S.Ct. 153 (1965). As noted by Judge Seth in his dissenting opinion, the Supreme Court in *Gondeck* did no more than require two different circuits to construe the same federal statute the same way. And he points out that this is no more than a supervisory manifestation and is of no help in a diversity problem such as this. *Gondeck*, further, was not a Rule 60(b) case but involved a review of the Longshoremen's and Harbor Worker's Compensation Act. But even in *Gondeck*, Mr. Justice Clark, joining in the judgment, agreed that litigation must at some point come to an end; and that the decision held "seeds of mischief for the orderly administration of justice"; and that he can think of nothing more unsettling to lawyers and litigants and more disturbing to their confidence in the evenhandedness of the court's processes than to be left in uncertainty as to when their cases may be considered finally closed. He further hopes that any rules of no finality, which the court "varnishes with the charms of reason," should be sparingly used.

The majority opinion opines that this case involves an extraordinary circumstance. As carefully pointed out by Judge Seth in his dissent, the mere fact that some of the parties remained in the federal court and one resorted to state court, hence leading to different results by reason of

the sequence in which they were decided, did not create an extraordinary circumstance. Obviously the two cases arose out of the same accident but otherwise, he noted, the problem is no different than that which arises in many cases where the fact situations are only sufficiently comparable to call for the application of a particular legal doctrine.

He further properly recognized that the original decision was fully in accordance with the *Erie* doctrine when decided in January, 1971. The majority opinion asserts that when the Oklahoma Supreme Court overruled precedent common law authority the decision was not thereafter in accordance with *Erie* and thus should be changed. Judge Seth then notes that if such a route is followed many cases will come in within this "*Erie* justification" no matter how many years have elapsed; and that this will create a new post-judgment remedy for retroactive application under the guise of the *Erie* doctrine.

This Court has considered the provisions of the residual clause on only two occasions, both cases involving immigration matters. *Klapprott* v. *United States*, 335 U.S. 601, 336 U.S. 942, 69 S.Ct. 384 (1949), and *Ackermann* v. *United States, supra*. In *Klapprott*, the Court vacated a default judgment, recognizing that at the time a judgment was entered the appellant was ill, penniless and in jail and thus unable to appear and interpose a defense amounting to inability to make a defense rather than "neglect."

In *Ackermann*, Rule 60(b)(6) relief was denied. There, denaturalization proceedings were brought against three parties on the basis of fraud. All were represented by coun-

sel and following a trial on the merits, separate judgments were entered. One appealed from the adverse judgment which was reversed on the government's admission that the evidence was insufficient to support the judgment. The other two did not appeal, but approximately four years later sought relief on motions alleging financial inability to appeal and reliance upon advice of a government official. This Court held that the circumstances did not justify Rule 60(b)(6) relief, Mr. Justice Minton noting that the Rule is not a substitute for appeal and that, "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." He then contrasted the *Klapprott* decision:

> "The comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. * * * "

In the instant matter the Respondents below made free, calculated and deliberate choices disavowing the application of Oklahoma common law as to their proceedings and claiming below, and on appeal, application of federal common law. They did not prevail on appeal and did not seek rehearing or certiorari to this Court whereupon the judgment became final. All parties relied on the finality of the judgment. Additionally, Respondents made a free, calculated and deliberate choice to remain in federal court though their cases had been removed. The "stratagem" which Davis used to avoid subsequent removal after dismissing and refiling in state court was equally available to the Respondents. Both Davis and Ellenwood were minors

and the Pierce estate was subject to administration proceedings. Oklahoma permits appointment of non-resident guardians and non-resident administrators. Davis caused appointment of a Tennessee co-guardian before refiling in state court. Petitioner is incorporated in Tennessee. Diversity was easily defeated.

Davis elected to forego a federal challenge, both as to interpretation of the Oklahoma law and upon the question of application of federal common law.

Pierce and Ellenwood had a choice. They had freedom of action. They had a disposition on the merits. They perfected an appeal from an adverse judgment. Thereafter the Tenth Circuit recognized the substantive correctness of the decision.

Surely the Court of Appeals has plowed dangerous and unsettling ground. It has opened the door to vacate final judgments in diversity cases solely because the state common law is changed. As pointed out by Chief Judge Lewis in his dissent, consistency even in criminal cases, is not an invariable exaction of the law. *United States* v. *Cudd* (10th Cir. 1974), 499 F.2d 1239, 1242.

Such a liberal interpretation of the residual clause, permitting relitigation of issues finally determined, establishes an unwarranted precedent. If permitted to stand, all federal judgments in common diversity cases can only be considered dormant and not final pending ultimate disposition of all potential claims.

The opinion below, with its overriding implications upsetting the orderly administration of justice, can have

only devastating effects on the sound principle of judgment finality. It was entered without precedent and in the face of the Tenth Circuit's own *Collins* opinion, as well as the uniform holdings of other Circuit Courts. No extraordinary situation is presented to justify relief within the *Klapprott* and *Ackermann* requirements.

The presented situation and the underlying principle of Rule 19(b) of the Rules of this Court mandate the exercise of its supervisory powers to prevent *substantial injustice*.

Truly the decision "holds seeds of mischief" for the orderly administration of justice. If whenever a valid judgment were called into question the court could review the matter previously adjudged to determine whether there had been error, a judgment would have no finality; immortal litigation would overcome mortal man; and the sound principle of fundamental repose which underlies *res judicata* would be subverted. *United States* v. *Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878).

CONCLUSION

For the reasons set forth above, Petitioner urges that Certiorari be granted; and that upon review, the final judgments originally entered herein be reinstated.

Respectfully submitted,

PAGE DOBSON, of the firm
RHODES, HIERONYMUS, HOLLOWAY & WILSON
2411 First National Center
Oklahoma City, Oklahoma 73102
405/235-8593

Counsel for Petitioner

September, 1975

APPENDIX A

FILED
DEC 2 1969
REX B. HAWKS, Clerk
U. S. District Court
By Zeta M. Cowan,
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLAUDIATTE PIERCE, Widow, et al. STEPHEN ELLENWOOD, a Minor, et al., Plaintiffs,	)	
-vs-	)	No. CIVIL 68-159 68-160
COOK AND CO., INC., a foreign corporation, and JOHN LEWIS EDWARDS, Defendants.	)	

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT

This cause having come on to be heard on Motion of Defendant, Cook and Co., Inc., for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action together with depositions, Answers to Interrogatories, Admissions on File, Documents Produced on File and Affidavits filed in one or all of cases no. CIV-68-267, CIV-68-159, CIV-68-160, and CIV-68-209 in said court, and reference being made to Findings of Fact and Conclusions of Law entered herein on the 7th day of November, 1969, which Findings of Fact and Conclusions of Law are hereby incorporated as a part of said Order for Summary Judgment by reference; and having heard oral argument and having found that there is no genuine issue of fact to be

submitted to the Trial Court as to the defendant, Cook and Co., Inc., whereby it is entitled to a judgment as a matter of law; and the Court finding that though there are multiple parties involved, there is no just reason for delay in granting said judgment whereby the Court finds and directs that the Order for Summary Judgment and Judgment should be entered prior to trial upon the merits as against the co-defendant;

IT IS HEREBY ORDERED that Motion of defendant, Cook and Co., Inc., for a summary judgment is in all respects granted, with exceptions to plaintiffs, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs (nor either of them) take nothing by their respective actions as against defendant, Cook and Co., Inc., and that the actions be dismissed as to it, with exceptions to plaintiffs.

DATED this 2nd day of December, 1969.

t/ LUTHER B. EUBANKS
LUTHER B. EUBANKS
United States District Judge

JUDGMENT ENTERED IN CIVIL DOCKET ON DEC. 2, 1969

ADELAIDE HOLSTON, DEPUTY.

[APPENDIX]

FILED
NOV 7 1969
REX B. HAWKS, Clerk
U. S. District Court
By Zeta M. Cowan,
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLAUDIATTE PIERCE, Widow, et al., STEPHEN ELLENWOOD, a Minor, et al., Plaintiffs,	)	
-vs-	)	No. CIVIL 68-159 68-160
COOK AND CO., INC., a foreign corporation, and JOHN LEWIS EDWARDS, Defendants.	)	

Kent C. Phipps of the firm Phipps, Johnson & Holmes, Ponca City, Oklahoma, and Paul E. Northcutt of the firm Northcutt, Northcutt & Jackman, Ponca City, Oklahoma, for the Plaintiff, Stephen Ellenwood

Raymond A. Trapp, Ponca City, Oklahoma, for the Plaintiff Claudiatte Pierce

Page Dobson of the firm Rhodes, Hieronymus, Holloway & Wilson, Oklahoma City, Oklahoma, for Defendants

---

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Before, LUTHER B. EUBANKS, United States District Judge

[APPENDIX]

FINDINGS OF FACT

The Court, pursuant to the provisions of FRCP Rule 56, and having fully considered the pleadings, depositions, Answers to Interrogatories, Admissions on file, documents produced on file and Affidavits, and after argument of counsel, makes the following findings of fact, to-wit:

I.

That on the 24th day of April, 1968, suit of Claudiatte Pierce, et al, No. CIV 68-159, originally filed in the District Court of Kay County, Oklahoma, and the case of Stephen Ellenwood, et al, No. CIV 68-160 originally filed in the District Court of Kay County, Oklahoma, were timely removed by defendants to the U. S. District Court for the Western District of Oklahoma, pursuant to the provisions of 28 U.S.C.A. Section 1441 et seq.;

II.

That thereafter suit of Terry Cook, et al., No. CIV 68-209, was duly removed to this court from the District Court of Kay County, Oklahoma; and that on July 3, 1968, Mike Davis, et al, filed suit in the U. S. District Court for the Western District of Oklahoma as No. CIV 68-267;

III.

That all of said cases were consolidated for the purpose of Motions and hearings on October 29, 1968; and that thereafter and on or about the 28th day of March, 1969, the cases of Terry Cook, et al., No. CIV 68-209, and Mike Davis, et al., No. CIV 68-267, upon application of the respective plaintiffs, were ordered dismissed without prejudice;

IV.

That the plaintiff, Claudiatte Pierce, was at the time of the filing of her Petition and at the time of removal a resident of Kay County, Oklahoma; and that the plaintiff, Stephen Ellenwood, a minor, and Judson Ellenwood, as

Next Friend, were at the time of filing said Petition and at the time of removal, residents of Kay County, Oklahoma; that the defendant, John Lewis Edwards, at the time of filing plaintiff's Petition and at the time of said removal, was a resident and citizen of Dallas, Texas; and that the several defendants, Cook Grain Company, Inc., Cook & Co., Inc., dba Cook Grain Company, Cook Grains, Inc. and substituted defendant Cook & Co., Inc., were corporations organized and existing under and by virtue of the laws of the State of Tennessee and had their principal offices without the State of Oklahoma whereby there is complete diversity of citizenship between the parties plaintiff and the parties defendant;

V.

That the amount in controversy in each case exceeds the sum of $10,000.00;

VI.

That the two pending suits are companion cases in that the wrongful death action of Claudiatte Pierce and the personal injury action of Stephen Ellenwood both arise out of a two-vehicle accident which occurred on January 11, 1968, at approximately 8:00 o'clock p.m. on U. S. Highway 270, approximately one-tenth of a mile west of Calumet, Canadian County, Oklahoma, within the Western Judicial District of the State of Oklahoma;

VII.

That the issues between the parties were joined;

VIII.

That by Court order of November 18, 1968, Cook and Co., Inc. was substituted as the sole corporate defendant in each of said cases;

IX.

That theretofore and on October 29, 1968, said cases were called for pre-trial conference pursuant to assignment at which time:

(a) On the Court's own Motion said cases were consolidated for all purposes but trial;

(b) That all parties stipulated and agreed that the Court should hear and determine the facts and the law as regards the ultimate liability of Cook and Co., Inc. only;

(c) That the Court assigned for oral argument on November 19, 1968, Motion for Summary Judgment contemplated to be filed by Defendant, Cook & Co., Inc.;

X.

That on the 18th day of November, 1968, and after the expiration of twenty (20) days from the commencement of these actions, Cook and Co., Inc. duly filed its Motion for Summary Judgment with supporting Brief and complied fully with the provisions of FRCP Rule 56; and said Motion is properly before this Court for disposition under said Rule.

XI.

That on November 19, 1968, pursuant to agreement of all parties, the taking of testimony, other evidence and oral argument were continued to an indefinite date more than ten (10) days from the service of the motion pending further briefing by the parties;

XII.

That thereafter and pursuant to assignment, the Motion for Summary Judgment came on for supplemental hearing and oral argument at which time:

(a) The following were introduced and received into evidence in support of and in opposition to Motion for Summary Judgment, to-wit:

(1) All pleadings of the parties;

(2) Depositions of John Lewis Edwards, Robert S. Cartmill, Bill Moss, Philip H. McCaull, O. E. Davis, Elaine David, Claudiatte J. Pierce, Terry N. Cook, Steve Cook, Norma Lee Cook, Stephen Ellenwood, Judson Ellenwood and Martha Ellenwood; and substitute copy of deposition of Harold House with attached exhibits, as if the original by stipulation of the parties, the Court records reflecting that the Shorthand Reporter had improvidently failed to file the original thereof;

(3) Interrogatories and Answers thereto;

(4) Requests for Admissions of Fact and Answers thereto;

(5) Request for Production of Documents and Productions thereto;

(6) Affidavits of C. J. Halley and Herb Ritter, Jr.;

(b) Whereupon following argument of counsel, the Court made preliminary findings of fact and of law, after which the hearing was continued for further briefing;

XIII.

Thereafter and on the 30th day of July, 1969, the Motion for Summary Judgment came on for further supplemental hearing after which the matter was taken under advisement and consideration by the Court;

XIV.

The Court having reviewed all of the evidence introduced and being fully advised, makes the following further findings of fact:

(a) That at the time of the accident, defendant, John Lewis Edwards, was driving a truck and trailer owned by him in an easterly direction on U. S. Highway 270 in Canadian County, Oklahoma, and was involved in an accident with an automobile being driven in a westerly direction by Teddy Joe Pierce, deceased husband of plaintiff, Claudiatte Pierce; and that Stephen Ellenwood was a passenger in the Pierce vehicle;

(b) That Edwards was hauling grain in his trailer which had been loaded in Geary, Oklahoma, by personnel of Zobisch Grain Co.; and that no employees or personnel of Cook and Co., Inc. were present at the loading; and thereby Cook and Co., Inc. is not charged with any overloading condition, if any;

(c) That the grain had been sold f.o.b. by Zobisch Grain Co. to Cook and Co., Inc.;

(d) That Cook and Co., Inc. did not own or lease any trucks or trailers for the purpose of hauling grain but that they were in the sole business of buying and selling grain, including futures;

(e) That Cook and Co., Inc. had no truck drivers in its employ; that it had no permits, franchises or licenses to haul grain;

(f) And that Edwards was thereby not a sub-licensee, sub-permittee or sub-franchisee of Cook and Co., Inc.;

(g) That Edwards was hauling said grain pursuant to a hauling contract with Cook and Co., Inc., the

provisions of which provided for a predetermined rate of payment per bushel and stated destination of Houston Public Elevator;

(h) That Edwards had hauled grain under contract for Cook and Co., Inc. on approximately 52 prior occasions without incident over a period of approximately 14 months; and that during said time Edwards hauled for other shippers and Cook and Co., Inc. contracted with other haulers;

(i) That Cook and Co., Inc. did not supervise or control and had no right of control as to the method or manner of operation of the hauler, did not specify a specific time for delivery of the grain, did not designate the route of travel to be taken; did not defray any maintenance or operation expenses of the hauler's trucks and made no withholding of income taxes;

(j) That John Lewis Edwards was an independent contractor to Cook and Co., Inc. at all pertinent times;

(k) That Edwards had consumed a couple of beers over a period of a couple of hours prior to the accident, but was not intoxicated at the time of the accident; but in any event Cook and Co., Inc. had no knowledge of the consumption and no knowledge of any drinking propensity in the driver, if any;

(l) That Cook and Co., Inc. had no knowledge of any defective condition of Edwards' rig or tires and did not inspect the same. Cook and Co., Inc. made no inquiry whatsoever concerning the condition of Edwards' rig or tires;

(m) That Cook and Co., Inc. had no knowledge of any disqualifications of Edwards or his driving record.

liability insurance, required permits, licenses or franchises and had no knowledge of any incompetence, if any. Cook and Co., Inc. made no inquiry whatsoever concerning the driving record of Edwards, his liability insurance, his lack of permits, licenses or franchises;

(n) That neither Cook and Co., Inc. nor any of its servants, agents or employees were directly involved in the accident, the subject of this action;

(o) That Cook and Co., Inc. is not a "private carrier" as defined by the federal Motor Vehicle Act;

(p) That there are no allegations or proof that Cook and Co., Inc. conspired to violate or in any manner aided or abetted any violation of the criminal provisions of the federal Motor Carrier Act at 49 U.S.C.A. Section 322 (c);

(q) That further John Lewis Edwards is exempted from the licensing requirements of the federal Motor Carrier Act under the provisions of 49 U.S.C.A. Section 303 (b) (6); and

(r) That under the applicable Oklahoma law, there can be no recovery herein against the movant, Cook and Co., Inc.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact and stipulations of the parties, as appropriate, the Court makes the following conclusions of law thereto, to-wit:

I.

That this Court has jurisdiction of the parties and subject matter under the provisions of 28 U.S.C.A. 1332; that said cases were timely and properly removed to the federal court pursuant to the provisions of 28 U.S.C.A. Section 1441

et seq.; and that the Western District of Oklahoma is the proper venue for the action;

II.

That in this diversity action the law of Oklahoma, the place of the occurrence of the accident and death to Teddy Joe Pierce, pertains to suits in tort for injury or wrongful death. See Albina Engine & Machine Works, Inc. v. Able, (10th Cir. 1962) 305 F. 2d 77, Slater v. Mexican National Railroad Company, 194 U.S. 120, 48 L. Ed. 900, 24 S.Ct. 581, and Cherokee Laboratories, Inc. v. Rogers, Okl., 398 P.2d 520 (1965);

III.

That this Federal Court sitting in the State of Oklahoma is obliged and bound to ascertain and apply the applicable state law. See Erie v. Tompkins, 304 U.S. 64, Ideal Structures Corporation v. Levin Huntsville Development Corporation (5th Cir. 1968), 396 F. 2d 917, Polk County, Georgia v. Lincoln National Life Insurance Company (5th Cir. 1959) 262 F. 2d 486, 490 and Chicago Burlington and Quincy Railroad Company v. Admiral Merchants Motor Freight, Inc. (7th Cir. 1968) 397 F. 2d 472;

IV.

That regardless of the stipulation of parties that finding of the relationship between John Lewis Edwards and Cook and Co., Inc. might be determined as a matter of fact by the Court, this Court finds that as a matter of law under the facts the relationship was that of independent contractor and not one of servant, agent or employee. See Sawin v. Nease, 97 P. 2d 27 (Okla. 1939), Fairmont Creamery Co. of Lawton v. Carsten, 55 P. 2d 757 (Okla. 1936), Coe v. Esau, Okl., 377 P. 2d 815 (1963). See also Albina Engine and Machine Works, Inc. v. Able, (10th Cir. 1962) 305 F. 2d 77;

V.

In Oklahoma a shipper has no duty to third persons for the negligent act of independent contractors unless the acts to be performed are unlawful or inherently dangerous. See Marion Machine Foundry and Supply Company v. Duncan, 187 Okl. 160, 101 P. 2d 813 (1940), Barsh v. Mullins, Administrator, Okl., 338 P. 2d 845 (1959) and Coe v. Esau, Okl., 377 P. 2d 815 (1963);

VI.

Ordinary hauling by truck is neither inherently dangerous nor unlawful. The shipper is under no duty to inquire into the nature and adequacy of an independent hauler's equipment. An automobile is not an inherently dangerous machine. Marion Machine Foundry and Supply Company v. Duncan, supra, and Ford Motor Co. v. Livesay, 610 Okl. 231, 160 Pac. 901;

VII.

Failure of trucker to have hauling permits, licenses or franchises has no causal connection with injuries sustained as a result of a truck driver's negligence and/or physical defects, whereby failure to have required permits is not "unlawful" so as to come within the exceptions to the general rule of non-liability. See Barsh v. Mullins, Administrator, supra;

VIII.

That a shipper is under no duty to inquire into the qualifications of an independent motor carrier's driver and has no duty even to exercise reasonable care in his selection. See Barsh v. Mullins, Administrator, supra, and Marion Machine Foundry and Supply Company v. Duncan at p. 815. See also Bradley v. Chickasha Cotton Oil Co., 184 Okl. 51, 84 P. 2d 629 (1938);

IX.

In Oklahoma a shipper has no duty to ascertain whether an independent hauler has complied with applicable motor vehicle laws. See Marion Machine Foundry and Supply Company v. Duncan, supra. But in any event, even actual knowledge by a shipper of an independent hauler's failure to have necessary permits does not expose the shipper to liability for said failure absent control. See Barsh v. Mullins, Administrator, supra.

X.

That under the facts, Cook and Co., Inc. does not come within obligation of non-delegable duty requirements as where a principal contractor is itself a carrier operating under a franchise, license or permit to haul or where it was the owner or lessee of equipment utilized in the haul;

XI.

There being no allegations or proof that Cook and Co., Inc. conspired to violate the criminal provisions of the Federal Motor Carrier Act (49 U.S.C. Section 301 et seq.), the provisions of that Act have no application in this case as to the independent shipper, Cook and Co., Inc.;

XII.

That under the findings of fact, the shipper was not itself a private carrier so as to come within the regulatory provisions of 49 U.S.C.A. Section 303 (a) (17). See United States of America v. Drum, 368 U.S. 373, 82 S.Ct. 408, 411 (1962). See also Barsh v. Mullins, supra;

XIII.

And that there being no genuine issue of any material fact and plaintiff having failed to prove a claim upon which a recovery can be based as to Cook and Co., Inc., movant is entitled to summary judgment herein in its favor as a matter of law under the provisions of FRCP Rule 56.

XIV.

By agreement of the parties, all further proceedings as against defendant, John Lewis Edwards, are held in abeyance.

Counsel for Cook and Co., Inc. will prepare appropriate judgment in accordance with the foregoing.

The Clerk of this Court is directed to mail a copy hereof to counsel of record.

Dated this 7th day of November, 1969.

Luther B. Eubanks
United States District Judge

APPENDIX B

FILED
United States Court of
Appeals, Tenth Circuit
DEC 21 1970
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM—1970

CLAUDIATTE PIERCE, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Plaintiffs-Appellants,

v.

COOK & CO., INC.,
Defendant-Appellee.

No. 97-70

STEPHEN ELLENWOOD, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Plaintiff-Appellant,

v.

COOK & CO., INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(D.C. Nos. 68-159 & 68-160 Civil)

Raymond A. Trapp (Kent C. Phipps on the brief) for Plaintiffs-Appellants.

Page Dobson, (Rhodes, Hieronymus, Holloway & Wilson on the brief) for Defendant-Appellee.

Before PHILLIPS, BREITENSTEIN and HILL, Circuit Judges.

PHILLIPS, Circuit Judge.

Claudiatte Pierce, as surviving widow of Teddy Joe Pierce,[1] deceased, for herself and Letitia Pierce, minor child of the decedent, brought an action to recover damages for the wrongful death of decedent against John L. Edwards and Cook and Company, Inc.[2]

Stephen Ellenwood, a minor, by Judson Ellenwood, as next friend, brought an action against Cook and Edwards to recover damages for personal injuries.[3]

The actions were instituted in the District Court of Kay County, Oklahoma. They arose out of a collision between an automobile and a truck. The actions were duly removed to the United States District Court for the Western District of Oklahoma.

Thereafter, Cook filed its separate answer in each case.

At a pretrial conference held on October 29, 1968, the court of its own motion consolidated the cases for all pur-

---

[1]Hereinafter called decedent.

[2]Hereinafter called Cook.

[3]Claudiatte Pierce and Stephen Ellenwood will sometimes be referred to collectively as plaintiffs.

poses except trial. The parties then agreed that the court should determine the facts and the law with respect to the ultimate liability of Cook, only.

The claims of plaintiffs against Edwards are not involved in this appeal. It involves only their claims against Cook.

The facts with respect to the collision are these:

Claudiatte is the widow of the decedent. Letitia is the minor child of the decedent.

On January 11, 1968, at about 8 p.m., decedent was driving his automobile in a westerly direction on U.S. highway 270,[4] a short distance west of Calumet, Oklahoma. Shortly before the collision, Edwards was driving his truck trailer loaded with wheat in an easterly direction on such highway, and to his left of the center line of the highway, viz., in the north lane of the highway, at a speed of about 50 miles per hour.

As the decedent was coming out of an "S" curve and was traveling in his right, or the north lane of the highway, the truck, with Edwards driving it, approached the decedent's automobile from the west, with its (the truck's) left wheels to the left of the center line of the highway, viz., in the north lane of the highway, at a speed of about 50 miles per hour. As the two vehicles were about to meet, Edwards steered his truck sharply to the right, causing the trailer to jackknife into and against the automobile of decedent, resulting in injuries to decedent from which he immediately died. Ellenwood suffered personal injuries as a result of the collision.

The treads of the tires on the tractor and trailer were so badly worn that the surface thereof was smooth, and the bolts holding the outside dual wheel at the left rear of the trailer were loose.

---

[4]Such highway runs east and west and is a two-lane highway.

The highway was wet from a recent rain.

Additional facts will appear from the findings hereinafter set out.

On November 18, 1968, Cook filed a motion for summary judgment in each case.

At the hearing on such motion for summary judgment, depositions, interrogatories and answers thereto, requests for admissions of fact and answers thereto, requests for the production of documents and documents produced, and affidavits were introduced in evidence in support of and in opposition to the motions for summary judgment.

On consideration thereof, the court found:

"(a) That at the time of the accident, defendant, * * * Edwards, was driving a truck and trailer owned by him in an easterly direction on U.S. Highway 270 in Canadian County, Oklahoma, and was involved in an accident with an automobile being driven in a westerly direction by Teddy Joe Pierce, deceased husband of plaintiff, Claudiatte Pierce; and that Stephen Ellenwood was a passenger in the Pierce vehicle;

"(b) That Edwards was hauling grain in his trailer which had been loaded in Geary, Oklahoma, by personnel of Zobisch Grain Co.; and that no employees or personnel of Cook * * * were present at the loading; and thereby Cook * * * is not charged with any overloading condition, if any;

"(c) That the grain had been sold f.o.b. by Zobisch Grain Co. to Cook * * * ;

"(d) That Cook * * * did not own or lease any trucks or trailers for the purpose of hauling grain but that they were in the sole business of buying and selling grain, including futures;

"(e) That Cook * * * had no truck drivers in its employ; that it had no permits, franchises or licenses to haul grain;

"(f) And that Edwards was thereby not a sub-licensee, sub-permittee or sub-franchisee of Cook * * * ;

"(g) That Edwards was hauling said grain pursuant to a hauling contract with Cook * * * the provisions of which provided for a predetermined rate of payment per bushel and stated destination of Houston Public Elevator;

"(h) That Edwards had hauled grain under contract for Cook * * * on approximately 52 prior occasions without incident over a period of approximately 14 months; and that during said time Edwards hauled for other shippers and Cook * * * contracted with other haulers;

"(i) That Cook * * * did not supervise or control and had no right of control as to the method or manner of operation of the hauler, did not specify a specific time for delivery of the grain, did not designate the route of travel to be taken; did not defray any maintenance or operation expenses of the hauler's trucks and made no withholding of income taxes;

"(j) That * * * Edwards was an independent contractor to Cook * * * at all pertinent times;

"(k) That Edwards had consumed a couple of beers over a period of a couple of hours prior to the accident, but was not intoxicated at the time of the accident; but in any event Cook * * * had no knowledge of the consumption and no knowledge of any drinking propensity in the driver, if any;

"(l) That Cook * * * had no knowledge of any defective condition of Edwards' rig or tires and did

not inspect the same. Cook * * * made no inquiry whatsoever concerning the condition of Edwards' rig or tires;

"(m) That Cook * * * had no knowledge of any disqualifications of Edwards or his driving record, liability insurance, required permits, licenses or franchises and had no knowledge of any incompetence, if any. Cook * * * made no inquiry whatsoever concerning the driving record of Edwards, his liability insurance, his lack of permits, licenses or franchises;

"(n) That neither Cook * * * nor any of its servants, agents or employees were directly involved in the accident, the subject of this action;

"(o) That Cook * * * is not a 'private carrier' as defined by the federal Motor Vehicle Act;

"(p) That there are no allegations or proof that Cook * * * conspired to violate or in any manner aided or abetted any violation of the criminal provisions of the federal Motor Carrier Act at 49 U.S.C.A. Section 322(c).

"(q) That further * * * Edwards is exempted from the licensing requirements of the federal Motor Carrier Act under the provisions of 49 U.S.C.A. Section 303(b)(6); and

"(r) That under the applicable Oklahoma law, there can be no recovery herein against the movant, Cook * * *."

The court concluded:

"I.

"That this Court has jurisdiction of the parties and subject matter under the provisions of 28 U.S.C.A. Section 1332; that said cases were timely and properly

removed to the federal court pursuant to the provisions of 28 U.S.C.A. Section 1441 et seq.; and that the Western District of Oklahoma is the proper venue for the action;

"II.

"That in this diversity action the law of Oklahoma, the place of the occurrence of the accident and death to Teddy Joe Pierce, pertains to suits in tort for injury or wrongful death. See Albina Engine & Machine Works, Inc. v. Able, (10th Cir. 1962) 305 F.2d 77, Slater v. Mexican National Railroad Company, 194 U.S. 120, 48 L.Ed. 900, 24 S.Ct. 581, and Cherokee Laboratories, Inc. v. Rogers, Okl., 398 P.2d 520 (1965);

"III.

"That this Federal Court sitting in the State of Oklahoma is obliged and bound to ascertain and apply the applicable state law. * * * ;

"IV.

"That * * * as a matter of law under the facts the relationship (between Edwards and Cook) was that of independent contractor and not one of servant, agent or employee. See Sawin v. Nease, 97 P.2d 27 (Okla. 1939), Fairmont Creamery Co. of Lawton v. Carsten, 55 P.2d (Okla. 1936), Coe v. Esau, Okl., 377 P.2d 815 (1963). See also Albina Engine and Machine Works, Inc. v. Able, (10th Cir. 1962) 305 F.2d 77;

"V.

"In Oklahoma a shipper has no duty to third persons for the negligent act of independent contractors unless the acts to be performed are unlawful or inherently dangerous. See Marion Machine Foundry and Supply Company v. Duncan, 187 Okl. 160, 101 P.2d 813 (1940), Barsh v. Mullins, Administrator, Okl., 338 P.2d 845 (1959) and Coe v. Esau, Okl., 377 P.2d 815 (1963);

"VI.

"Ordinary hauling by truck is neither inherently dangerous nor unlawful. The shipper is under no duty to inquire into the nature and adequacy of an independent hauler's equipment. An automobile is not an inherently dangerous machine. Marion Machine Foundry and Supply Company v. Duncan, supra, and Ford Motor Co. v. Livesay, 610 Okl. 231, 160 Pac. 901;

"VII.

"Failure of trucker to have hauling permits, licenses or franchises has no causal connection with injuries sustained as a result of a truck driver's negligence and/or physical defects, whereby failure to have required permits is not 'unlawful' so as to come within the exceptions to the general rule of non-liability. See Barsh v. Mullins, Administrator, supra;

"VIII.

"That a shipper is under no duty to inquire into the qualifications of an independent motor carrier's driver and has no duty even to exercise reasonable care in his selection. * * * ;

"IX.

"In Oklahoma a shipper has no duty to ascertain whether an independent hauler has complied with applicable motor vehicle laws. * * *.

* * * * * *

"XII.

"That under the findings of fact, the shipper was not itself a private carrier so as to come within the regulatory provisions of 49 U.S.C.A. Section 303(a)(17). See United States of America v. Drum, 368 U.S. 370, 82 S.Ct. 408, 411 (1962). See also Barsh v. Mullins, supra."

The court entered its order sustaining the motion and dismissing the action as to Cook. Pierce and Ellenwood have appealed.

In the order of dismissal, the court found in each case that there was no genuine issue of material fact between the plaintiffs and Cook. In their brief, counsel for plaintiffs state that such finding is not questioned on this appeal.

In their complaint, plaintiffs predicated the liability of Cook on the alleged fact that at the time of the collision Edwards was acting as the agent, servant or employee of Cook. They no longer rely on such relationship and concede that the court's finding that the relationship between Edwards and Cook was that of an independent contractor is correct.

While they did not amend their complaint, they asserted in the trial court and now assert that in order to carry out the national policy and purposes of Congress in enacting Part II of the Interstate Commerce Act (the Motor Carrier Act), 49 U.S.C.A. §§ 301, et seq., it is necessary to determine the liability of Edwards under the facts in the instant case in accordance with federal common law and not by the law of the state in which the collision resulting in decedent's death and Ellenwood's injuries occurred.

Hence, we turn to the provisions of the Motor Carrier Act, and will set out the parts thereof that we deem pertinent.

49 U.S.C.A. § 302(b) provides:

> "(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

49 U.S.C.A. § 303(b)(6) in part here pertinent provides:

"(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: * * *."

49 U.S.C.A. § 304 (a)(3) provides:

"(a) It shall be the duty of the Commission—

* * * * * *

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title."

49 U.S.C.A. § 303(a)(15) reads:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce for compensation (other than transportation referred to in paragraph 14) of this subsection and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation

services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

49 U.S.C.A. § 303(a)(17) reads:

"(a) As used in this chapter—

* * * * * *

"(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

49 U.S.C.A. § 322(c) in part here pertinent provides:

"(c) Any person, whether carrier, shipper, consignee, * * * or any * * * employee, agent, or representative thereof, who * * * shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not less than $200 nor more than $500 for the first offense and not less than $250 nor more than $2,000 for any subsequent offense."

Motor Carrier Safety Regulations promulgated by the Interstate Commerce Commission are set forth in 49 C.F.R.,

Chapter III, Subchapter B, Parts 390-398, inclusive. Part 394 was promulgated under the authority of sec. 204, 49 Stat. 546, as amended, Sec. 220, 49 U.S.C. 320, and Part 397 was promulgated under the authority of 18 U.S.C. § 834. The remaining parts of such Chapter III, Subchapter B, were promulgated under the authority of 49 U.S.C. §§ 303, 304. None of them imposes any duty on shippers.

From the facts disclosed by the record, it is clear that Cook was neither a "contract carrier" nor a "private carrier" as those terms are defined in the Motor Carrier Act.

There is neither allegation nor proof that Cook violated any provision of 49 U.S.C.A. § 322(c) or entered into any conspiracy to do so.

Counsel for plaintiffs concede that although the Motor Carrier Act was enacted in 1935, they have been unable to find any decision by a state or federal court which passed upon and sustained the contention they make here.

Counsel for plaintiffs cite two cases where a contract carrier was held criminally liable for a violation of 49 U.S.C.A. § 309(a) and a shipper was held criminally liable for aiding and abetting the carrier in so doing. We assume they are cited on the theory that by analogy they lend some support to plaintiff's contention.

One case is United States v. Gunn, U.S.D.C. W.D. Ark., 97 F.Supp. 476. In that case, Gunn was charged with engaging in the business of a contract carrier by motor vehicle in interstate commerce on the public highways without an existing permit from the Interstate Commerce Commission authorizing him so to do, in violation of 49 US.C.A. § 309(a), and Ozark Packing Company was charged with aiding and abetting Gunn in so doing.

At the trial, Gunn entered a plea of nolo contendere and was adjudged guilty. Ozark pleaded not guilty and the case was tried to the court. The facts were stipulated and were as follows:

On October 10, 1949, Gunn entered into a lease with Ozark, by which Gunn leased to Ozark for the period of one trip for the transportation of canned vegetables from Ozark, Arkansas, to Jacksonville, Florida, one motor vehicle at a charge below the usual rate for such transportation by a contract carrier. The lease provided that Gunn was to furnish for the operation of such truck the required lubricants and fuel and competent drivers. Like leases were entered into between Gunn and Ozark for the transportation of loads of canned vegetables from Arkansas to Florida.

The court found that the transportation of such canned vegetables from Arkansas to Florida was actually carried out by Gunn with trucks operated by drivers employed by him and paid by him, who acted pursuant to his orders and instructions, and in so doing that Gunn engaged in the business of a contract carrier by motor vehicle in interstate commerce and did not have an existing permit from the Interstate Commerce Commission so to do, and that Ozark aided and abetted Gunn in so doing.

It is obvious that the purpose of the leases was to enable Gunn actually to so engage in the business of a contract carrier, but to avoid the requirements of 49 U.S.C.A. § 309(a), and to enable Ozark to obtain a reduced rate, and that Ozark knowingly and intentionally aided and abetted Gunn in so doing.

Here, Cook did not in any way aid or abet Edwards, the motor carrier, in the operation of a defective truck or in negligently operating such truck, or engage in any conspiracy with Edwards to avoid any of the safety requirements of the regulations promulgated by the Interstate Commerce Commission with respect to motor carriers. Those facts, we think, clearly distinguish the instant case from the Gunn case.

The other of the two cases is United States v. J & J Truck Leasing, Inc., U.S.D.C. D.Kan., 258 F.Supp. 105. In that case, Truck Leasing entered into a lease with Lady

Baltimore Foods, Inc., for the purpose of enabling Truck Leasing to carry on the business of a contract carrier by motor vehicle in interstate commerce on the public highways without a permit issued to it by the Interstate Commerce Commission, and to enable Baltimore Foods to get the benefit of a reduced rate.

Both Truck Leasing and Baltimore Foods were found guilty.

That case, in our opinion, is distinguishable from the instant case for the same reasons we stated above with respect to the Gunn case.

Plaintiffs rely primarily on two decisions under the Federal Communications Act, which they assert are analogous to the instant case. They are Reitmeister v. Reitmeister, 2 Cir., 162 F.2d 691 and Ivy Broadcasting Co., Inc. v. American Tel. & Tel. Co., 2 Cir., 391 F.2d 486. It should be kept in mind that the field of regulation of communications has been preempted by Congress, and state regulation thereof is thereby excluded. That is not true of the regulation of motor carriers by the Motor Carrier Act or regulations promulgated thereunder.

In the latter of the two cases, Ivy Broadcasting, a user of interstate telephone service, brought an action against American Telephone and Telegraph Company for breach of contract and negligence in the rendition of interstate telephone service. American Telephone and Telegraph Company counterclaimed for unpaid interstate telephone service charges. The United States District Court held it lacked subject matter jurisdiction.

The Circuit Court of Appeals held that Ivy's claims arose under the Federal Communications Act and were therefore within the jurisdiction of the federal court; and that the counterclaims, to the extent that they were compulsory and to the extent that they were based on tariffs required to be filed by the Federal Communications Com-

mission, also were within the jurisdiction of the federal court. It based federal jurisdiction not on a specific violation of the Act but held that the Act provided for uniformity of rates and equality of service, and that the duties, charges, and liabilities of telephone and telegraph companies with respect to interstate telephone and telegraph service are governed solely by the federal law, and that the states are precluded from acting in such area.

In that case, the action was by a user of interstate telephone service. It would possibly be applicable here if a claim were asserted by a shipper for a breach of contract for carrier service or negligence by the carrier in the performance of such service, or for a claim arising out of amounts due from a shipper to a carrier under rates fixed by the Interstate Commerce Commission, but here we have an action by a third party against the carrier for wrongful death and by another third party for personal injuries.

Reitmeister v. Reitmeister, supra, involved damages for the interception and unauthorized disclosure of telephone messages. The question was whether the federal court had subject matter jurisdiction.

The Federal Communications Act of 1934, 47 U.S.C.A. § 151, et seq., imposed a criminal penalty for any person who intercepted or published telephone messages. In its opinion, the court said:

> " * * * Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal. * * * "

Here, neither the Act nor the regulations promulgated thereunder imposed any criminal sanctions on Cook for the negligence of Edwards or the defects in the equipment

he used. Reitmeister would be applicable in the instant case only if the Motor Carrier Act or regulations promulgated thereunder imposed such criminal sanctions on Cook as a shipper. Hence, we think the decision in Reitmeister is wholly inapplicable in the instant case.

There is no language in the Motor Carrier Act indicating any intent of Congress to supersede state tort law with respect to negligence or wrongful death liability of a shipper. Hence, state law governs with respect to Cook's liability in the instant case.[5]

Plaintiffs do not assert they would have the right to recover against Cook if Oklahoma law controlled. The common law recognized no right of recovery for wrongful death. Pierce's claim for wrongful death is based on the Oklahoma wrongful death statute, which is in derogation of common law, and Cook's liability thereunder clearly must be determined in accordance with Oklahoma law.

We conclude that Cook did not violate any penal provision of the Motor Carrier Act or any penal regulations promulgated thereunder by the Interstate Commerce Commission, nor aid or abet Edwards in violating such a provision or regulation imposing penal sanctions on a carrier; and that the issue of whether Cook was liable to Ellenwood for the negligence of Edwards is controlled by Oklahoma law.

We hold that under Oklahoma law, Cook was not liable to either of the plaintiffs for the negligence or wrongful acts of Edwards.

Affirmed.

---

[5]See Rosdail v. Western Aviation, Inc., U.S.D.C. D. Colo., 297 F.Supp. 681; Rogers v. Ray Gardner Flying Service, Inc., 5 Cir., ... F.2d ....., (decided November 16, 1970).

APPENDIX C

FILED
JUN 24 1975
HOWARD K. PHILLIPS
Clerk
United States Court of
Appeals, Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CLAUDIATTE PIERCE, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Plaintiffs-Appellants,

v.

COOK & CO., INC.,
Defendant-Appellee.

No. 97-70

STEPHEN ELLENWOOD, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Plaintiff-Appellant,

v.

COOK & CO., INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(D.C. Nos. 68-159 & 68-160 Civil)

Kent C. Phipps, of Phipps, Johnson & Holmes, for Plaintiffs-Appellants.

Page Dobson, of Rhodes, Hieronymus, Holloway & Wilson, for Defendant-Appellee.

Before LEWIS, Chief Judge, BREITENSTEIN, HILL, SETH, HOLLOWAY, McWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Plaintiffs-appellants have moved for relief under Rule 60(b), F.R.Civ.P., from a judgment of this court. The problem is that the same vehicular accident has produced divergent results in federal and state courts. We grant the motion and remand the case to the district court with directions.

Edwards, the owner and driver of a tractor-trailer combination, was hauling wheat for defendant-appellee Cook. On January 11, 1968, Edwards' rig collided on an Oklahoma highway with a car driven by Ted Pierce. Pierce was killed and passengers in his car were injured. Claudiatte Pierce brought suit in an Oklahoma state court for herself as surviving widow of Ted and for their minor daughter Letitia. Similar state suits were brought against Cook by Stephen Ellenwood and Mike Davis, passengers in the Pierce car.

On the motion of defendant Cook each case was removed to federal court on diversity grounds. The Mike Davis case was dismissed by the federal court on the motion of the plaintiff. It was later refiled in state court by co-guardians of Mike, a minor. The guardianship maneuver apparently destroyed diversity and prevented removal.

The federal district court granted defendant Cook summary judgment on the ground that under the Oklahoma decision in Marion, Machine Foundry & Supply Co. v. Duncan, Okl., 101 P.2d 813, the shipper, Cook, was not liable for the torts of the independent contractor, Edwards.

Claudiatte Pierce and Ellenwood appealed. They conceded the effect of the Marion Machine decision and argued that, because of the Motor Carrier Act, 49 U.S.C. § 301 et seq., federal common law controlled. We held that the Motor Carrier Act did not indicate a congressional intent to supersede state tort law with respect to liability of a shipper, and concluded that Oklahoma law controlled. Pierce v. Cook & Co., 10 Cir., 437 F.2d 1119.

In the Mike Davis case the Oklahoma state court gave summary judgment for Cook on the basis of the Marion Machine decision. The case then went to the Oklahoma Supreme Court which specifically overruled Marion Machine and said, Hudgens v. Cook Industries, Inc., Okl., 521 P.2d 813, 816:

> "Where there is foreseeable risk of harm to others unless precautions are taken, it is the duty of one who is regularly engaged in commercial enterprise which involves selection of motor carriers as an integral part of the business, to exercise reasonable care to select a competent carrier. Failure to exercise such care may create liability on the part of the employer for the negligence of the carrier."

The court remanded the case for jury trial. The case was then settled favorably to the plaintiff.

The Tenth Circuit decision became final in January, 1971. The Oklahoma Supreme Court decision became final in May, 1974. In November, 1974, Claudiatte Pierce and Ellenwood filed the pending Rule 60(b) motion for relief from judgment.

The first question is the propriety of consideration of the motion by the court of appeals. Movants seek relief as a matter of law from a judgment of this court. This is not a case like Wilkin v. Sunbeam Corporaion, 10 Cir., 405 F.2d 165, cert. denied 409 U.S. 1126, where a motion was filed in the court of appeals for leave to file in the district court a Rule 60(b) motion on the grounds of newly discovered evidence and fraud. Saying that the district court was in a better position to decide the issues presented, we held that the motion was unnecessary. The procedural problems involved have been the subject of much discussion. Compare Wilkin with Brady v. Beams, 10 Cir., 132 F.2d 985, 986, cert. denied 319 U.S. 747; National Brake & Electric Company v. Christensen, 254 U.S. 425, 430; and Butcher & Sherrerd v. Welsh, 3 Cir., 206 F.2d 259, 262, cert. denied 327 U.S. 799. Because our judgment is final and mandate issued, the trial court could well believe that it is without power to determine a legal question contrary to the decision of the court of appeals. Accordingly, we shall consider the motion.

Rule 60(b) provides that a court may grant relief from a judgment on five stated grounds and then says: "(6) any other reason justifying relief from the operation of the judgment." The one-year limitation provided in the rule does not apply to (6).

A Rule 60(b) motion is addressed to the sound discretion of the court. Caribou Four Corners, Inc. v. Truck Insurance Exchange, 10 Cir., 443 F.2d 796, 799 and cases there cited. Quoting 7 Moore Federal Practice at p. 308 (1950 ed.), Radack v. Norwegian America Line Agency, Inc., 2 Cir., 318 F.2d 538, 542, says that Rule 60(b) gives the court

a "grand reservoir of equitable power to do justice in a particular case." The court goes on to say that "the rule should be liberally construed when substantial justice will thus be served." Ibid.

An adjudication must at some time become final. We recognized this principle in the Collins litigation. There, the plaintiff's attacked the constitutionality of a Kansas statute and lost. Collins v. City of Wichita, Kansas, 10 Cir., 225 F.2d 132, cert. denied 350 U.S. 886. A year later in an unrelated case the Supreme Court held the Kansas statute unconstitutional. Plaintiffs then sought Rule 60(b)(6) relief which we denied, Collins v. City of Wichita, Kansas, 10 Cir., 254 F.2d 837, 839, saying, (1) "in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6) when such action is appropriate to accomplish justice," and (2) "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief." Collins differs from the instant case in that there the decisional change came in an unrelated case. Here it came in a case arising out of the same accident as that in which the planitiffs now before us were injured. The question is whether we have here an extraordinary situation justifying Rule 60(b)(6) relief.

Our attention is called to no case considering the situation before us. Plaintiffs were forced into federal court by Cook's removal of their state court actions on diversity grounds. They lost because state law controls and the Marion Machine decision defeated their claims as a matter of law. Another party, exercising a stratagem not shown to be available to these plaintiffs, obtained the reversal of the Marion Machine decision and a settlement thereafter.

Research has disclosed only one case considering divergent results from a common vehicular accident and it afforded relief to the previously unsuccessful party. Gondeck v. Pan American World Airways, Inc., 382 U.S. 25,

was concerned with a claim for death benefits under the Longshoremen's and Harbor Workers' Compensation Act. Two men were killed in the same accident. An award made by the Department of Labor to the survivors of one of the men was set aside in the United States District Court for the Southern District of Florida. The Fifth Circuit affirmed. United States v. Pan American World Airways, Incorporated, 5 Cir., 299 F.2d 74. The Supreme Court denied certiorari, 370 U.S. 918, and on October 8, 1962, denied rehearing, 371 U.S. 856.

The survivors of a second man killed in the same accident litigated in the Eastern District of Virginia and lost but the Fourth Circuit reversed and upheld the right to recover. Pan American World Airways, Incorporated v. O'Hearne, 4 Cir., 335 F.2d 70.

The survivors of the first then went back to the Supreme Court in 1965 with a petition for rehearing. The Supreme Court granted the rehearing, granted certiorari, and reversed the Fifth Circuit court of appeals. In so doing, it said, 382 U.S. at 27:

> " * * * since, of those eligible for compensation from the accident, this petitioner stands alone in not receiving it, 'the interests of justice would make unfair the strict application of our rules.' "

The reasons for relief in the instant case are more compelling than those in Gondeck. There two federal courts differed as to the construction and application of a federal statute. We are concerned with an action in which federal jurisdiction depends on diversity. In diversity jurisdiction cases the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 74-75; Guaranty Trust Co. v. New York, 326 U.S. 99, 109; Hanna v. Plumer, 380 U.S. 460, 468; and Merchants Transfer & Warehouse Co. v. Ragan, 10 Cir., 170 F.2d 987, 991, aff'd 337 U.S. 530. Here they were not.

The unusual combination of events which have occurred make the situation extraordinary. The federal courts in which plaintiffs were forced to litigate have given them substantially different treatment than that received in state court by another injured in the same accident. The outcome determination principle mandated by Erie v. Tompkins has been violated.

Relief under Rule 60(b)(6) "is appropriate to accomplish justice" in an extraordinary situation. Collins, 254 F.2d at 839. Accordingly, our judgment heretofore entered in this case is vacated and the case is remanded. We do not set aside the judgment of the trial court. If plaintiffs file a Rule 60(b)(6) motion for relief from the trial court's judgment, that court shall consider the motion, and any response thereto, in the light of the Hudgens opinion, 521 P.2d 813, and of this opinion and shall make such determination as it deems proper.

Motion granted and case remanded with directions.

No. 97-70 PIERCE, et al. v. COOK & CO., INC.

BARRETT, Circuit Judge, concurring in the result:

I concur in the result reached by the majority. Notwithstanding my strong disinclination to disturb a final judgment, I conclude that under the circumstances of this case that such is necessary in order to effect fundamental justice, thus justifying application of Rule 60(b)(6), Fed. R.Civ.P. on behalf of plaintiffs-appellants (hereinafter referred to as Pierce-Ellenwood).

Pierce-Ellenwood filed their respective actions in state courts. Defendant-appellee (hereinafter referred to as Cook) removed the actions to federal district court in diversity grounds.[1]

---

[1]28 U.S.C. § 1441 provides, inter alia, for removal only if none of the parties joined and served as defendants is a citizen of the State in which

It is fundamental that in diversity cases, the federal courts must (as in the instant consolidated cases) accept the most recent pronouncement of state law. The difficulty with such reliance, however, is succinctly pointed up in the case at bar—when the highest court in the state subsequently overrules the state law decision relied upon by the federal courts.

The "danger ahead" signal should always be out in diversity actions. The majority opinion evidences a most striking example.

We have held that the difficulties of ascertaining what the highest court in a state may subsequently determine the state law to be does not, in and of itself, afford sufficient ground for the federal court to decline to exercise its jurisdiction to decide a diversity case properly before it. Holt v. King, 250 F.2d 671 (10th Cir. 1957); and see Preston v. Aetna Life Ins. Co., 174 F.2d 10 (7th Cir. 1949), cert. denied, 338 U.S. 829 (1949). And we have held that the views of a federal district judge, who is a resident of the state where the controversy arose in a case involving interpretations of the law of the state, carry extraordinary persuasive force on appeal where there are no state decisions on point or none which provide a clear precedent. United States v. Wyoming National Bank of Casper, 505 F.2d 1064 (10th Cir. 1974), (the absence of a controlling state decision); Hardy Salt Company v. Southern Pacific Transportation Company, 501 F.2d 1156 (10th Cir. 1974), (unsettled peripheral questions of state law); Casper v. Neubert, 489 F.2d 543 (10th Cir. 1973), (on unsettled law in his state); Stafos v. Jarvis, 477 F.2d 369 (10th Cir. 1973), cert. denied 414 U.S. 944 (1973), (not aided in its consid-

---

[1] (Continued)
the action is brought. 28 U.S.C. § 1332 vests original jurisdiction in federal district courts in all civil actions where the matter in controversy exceeds the sum of $10,000.00, exclusive of interests and costs, and is between—(1) citizens of different States. . . .

eration by either administrative interpretation or judicial expression from state court); Industrial Indemnity Company v. Continental Casualty Company, 375 F.2d 183 (10th Cir. 1967), (no decisions from Oklahoma courts in point or which are analogous); Mitton v. Granite State Fire Ins. Co., 196 F.2d 988 (10th Cir. 1952), (the Colorado courts have not passed upon the right to interest in cases similar to the one before us and we are unwilling to overrule the considered appraisal of the Trial Judge).

In my view, Rule 60(b)(6) *supra*, should always be applied in order to relieve a party who did not invoke the jurisdiction of the federal court in a diversity suit from a judgment adverse to that which would otherwise have been favorable in the state court forms. One who invokes the jurisdiction of the federal court when the diversity requirements are present should pay the consequences of that election. A change in state law should not be cause for relief to one who has voluntarily selected that forum. Such a litigant is not entitled to the proverbial "two bites at the apple." Furthermore, such application should do much to promote and strengthen proper Federal-State court relations.

LEWIS, Chief Judge, with whom SETH, Circuit Judge, joins, dissenting.

I am completely uncertain as to what impact the ruling of the majority has, or is intended to have, on established procedural and substantive law or in the administration of justice generally. The opinion would appear to recognize that relief under Rule (60(b) is directed to the sound discretion of the trial court (except in this case) and remands the case to the trial court for consideration under Rule 60(b)6 but in accord with the views expressed in the opinion. There is, of course, no existent motion under Rule 60(b)6, or any motion at all, before the trial court but the majority suggests to plaintiffs that one be filed. This unusual judicial direction is surprising especially since

the case was presented to this court in reliance upon Rule 60(b)5 and counsel for plaintiffs expressly disavowed reliance on Rule 60(b)6 during oral argument. The impact, of any, of Rule 60(b)6 was neither argued nor briefed for this court and the authorities cited in the majority opinion appear in the case for the first time.

By remanding the case to the trial court with "directions" the discretion of the trial court has apparently been aborted for all practical purposes through a pre-decision of this court on the merits. The majority appears to hold that divergent results from a common vehicular accident are, per se, grounds for relief under Rule 560(b)6, at least in diversity cases. If my interpretation of the intended impact of the majority ruling is correct then the court has indeed plowed new ground for no present authority supports such a rule. Federal judgments in common disaster diversity cases can then only be considered as dormant, not final, even though the case be the inverse of the one we here consider. A paid judgment would seem to be recoverable and resultant confusion inevitable.

The factual background of this case is based on a common disaster and, although the majority opinion does not specifically so state, I assume that the majority ruling is intended to be limited by this "extraordinary circumstance." But the driving force of the ruling, the desire to obtain consistent results in state and federal cases involving state law, to me, seems equally applicable to identical accidents and even to such instances as this court considered in Collins v. City of Wichita, 254 F_2 837, *cert. denied*, 350 U.S. 886. Perhaps such a breakthrough would be desirable; perhaps not, for consistency, even in criminal cases, is not an invariable exaction of the law. United States v. Cudd, 10 Cir., 499 F_2 1239, 1242. In any event, I do not agree that the court has properly exercised its appellate function in this case and accordingly I dissent and join with Judge Seth in his expressed views.

NO. 97-70—CLAUDIATTE PIERCE et al. v. COOK & CO., INC.

SETH, Circuit Judge, dissenting, with whom, LEWIS, Chief Judge, joins:

This began as a typical adversity case, and it really still is, but unfortunately, as sometimes happens, after the decision the state case law changed. Some of the parties were in the state courts and some in the federal courts. This led to different results in the state and federal courts by reason of the sequence in which the cases were decided. The problem, and the "risk," in such cases is pointed up by the fact that the two cases arose out of the same accident, but otherwise the problem is no different than that which arises in many cases where the fact situations are only sufficiently comparable to call for the application of a particular legal doctrine.

The argument advanced by the majority is equally applicable to any diversity case, and the fortuitous circumstance of one accident makes no legal difference whatever, and certainly does not make one instance an "extraordinary circumstance" and the other not.

The decision was fully in accordance with Erie v. Tompkins when the federal case was decided by this court in January, 1971. The majority asserts that the fact that in November, 1974, when the Oklahoma Supreme Court changed the doctrine, the decision was not thereafter in accordance with *Erie* and thus should be changed. If this route is followed, many cases will come within this *Erie* justification advanced by the majority, no matter how many years may have elapsed. This will be a new post-decision or retroactive application of *Erie* which has interesting implications. The principles will be just the same in such cases. The time span is horrendous here as the accident happened in 1968, our decision was in 1971, and the state court decision creating the new doctrine was in 1974, and here it is 1975.

Collins v. City of Wichita, 254 F.2d 837 (10th Cir.), was correctly decided and should not be overruled as the majority has done. There is no reason to refer here to the need for the finality of judgments. The validity of the doctrine is evident, and there is no basis for the creation of exceptions based on purely fortuitous fact circumstances with no legal difference from many others.

The majority places reliance on Gondeck v. Pan American World Airways, Inc., 382 U.S. 25, where the Supreme Court did no more than require two different circuits to construe the same federal statute the same way. This is no more than a supervisory manifestation, and is of no help in a diversity problem such as this.

The appellants in the original case thought they could prevail on the issue of construction of a federal statute; they persisted in the federal courts after the defendants removed the case, and they lost in this court on the point they advanced. The other group of plaintiffs took the state route, overturned the theretofore prevailing state doctrine and won. The majority would here give the losing parties a second bite at the apple.

The points raised in the majority decision on the merits have been considered above, but they need not have been because the unusual thing the majority has done is to consider the motion as one directed to the "judgment" of this court. The proper procedure would seem to be to consider the motion as one for leave to file a 60(b) motion in the trial court, and to permit that court to consider the matter free of restrictions that may arise from our mandate issued in the original action. Rule 60(b) is intended for application to the trial courts. There is no point in this court seeking to apply the motion to its "judgment," and to decide the issue fully, to set such judgment aside, and to remand the case. All that is contemplated by the rules, at most, is that this court grant leave to file in the district court, as indicated above. Instead with the decision of this

court on the merits, there is, of course, nothing for the trial court to decide. If it decides to follow the majority decision, a trial will be had. This is apparently mandated by the majority decision. But if the trial court for some reason feels that no relief is indicated under Rule 60(b), then the parties can appeal to this court, and the majority can decide the same question again. This in itself indicates that the 60(b) motion is properly addressed to the trial court, and not to this court.

Thus I would consider the motion as one for leave to file in the district court; to grant it without first deciding the merits, and so leave our judgment and mandate intact and so have the matter considered in the sequence the rules contemplate.

APPENDIX D

RULE 60(b) FEDERAL RULES OF CIVIL PROCEDURE

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applictaion; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed this ..... day of September, 1975, postage fully paid, to counsel for Respondents, Kent C. Phipps, P. O. Box 1069, Ponca City, Oklahoma 74601.

.....

Counsel for Petitioner

Supreme Court, U. S.
FILED
NOV 3 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-449

Cook & Co., Inc.,
Petitioner,

VERSUS

Claudiatte Pierce, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Respondents.

Cook & Co., Inc.,
Petitioner,

VERSUS

Bertrese Ellenwood, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Phipps, Johnson & Holmes
Kent C. Phipps
Security Bank Building
P. O. Box 1059
Ponca City, Oklahoma 74601
Attorney for Respondents

October, 1975

Litterbark Typesetting Co., 519 W. Calif., Oklahoma City, Ph. 235-0030

TABLE OF CONTENTS

	PAGE
Introduction	1
Arguments	3
I. The Tenth Circuit properly assumed jurisdiction in this cause	3
II. The doctrine of election of remedies is not applicable to this case	4
III. Finality of judgment must yield to the interest of justice	7
IV. The instant case is unique and justifies relief under Rule 60(b)(6)	9
Conclusion	13

TABLE OF AUTHORITIES

CASES:

Abdallah v. Abdallah (Cir. 3, 1966), 359 F.2d 170	6
Akerman v. U. S., 340 U.S. 193, 71 S.Ct. 209 (1950)	7, 10
Bernstein v. United States (10 Cir. Colo.), 256 F.2d 697, cert. dism'd 358 U.S. 924	4
Brady v. Beams, 10 Cir., 132 F.2d 985, cert. denied 319 U.S. 747	3
Butcher & Sherred v. Welsh, 3 Cir., 206 F.2d 259, cert. denied 327 U.S. 799	3
Caribou Four Corners, Inc. v. Truck Insurance Exchange (10 Cir.), 443 F.2d 796	12
Collins v. City of Wichita (Cir. 1958), 254 F.2d 837	8
Erick Rios Bridoux v. Eastern Airlines (D.C. Cir. 1954), 214 F.2d 207	11
Erie Railroad Co. v. Tompkins, 304 U.S. 64	10

AUTHORITIES CONTINUED PAGE

Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (10 Cir. 1962), 303 F.2d 527 ..... 4, 5

Gaines Brothers Co. v. Fourth National Bank, Okla., 133 P.2d 742, 144 A.L.R. 1434 5

Gondeck v. Pan American World Airways, Inc., 382 U.S. 25, 86 S.Ct. 153 (1965) 9

Greater Boston Television Corp. v. F.C.C. (1971), 463 F.2d 268 3

Hartman v. Lauchli (C.A. Mo. 1962), 304 F.2d 431 3

Hudgins v. Cook Industries, Inc., 310 F.Supp. 32 (1970) 8

Hudgins v. Cook Industries, Inc., Okla., 521 P.2d 813 (1974) 8

Klaprott v. United States, 335 U.S. 601, 369 S.Ct. 384 (1949) 12

Marion Machine Foundry & Supply Co. v. Duncan, Okla., 101 P.2d 813 (1940) 6, 8, 9

McSparran v. Weist (Cir. 3, 1968), 402 F.2d 868 8

National Brake & Electric Company v. Christensen, 254 U.S. 425 3

Pierre v. Bermuth Lembcke, 20 F.R.D. 116 (1956) 11

Pierce, et al. v. Cook & Co., Inc., 10 Cir., 437 F.2d 1119 3

Polites v. United States, 364 U.S. 427, 81 S.Ct. 202 (1960) 7, 9, 10

State ex rel. Chaub v. Scottsbluff, Neb., 100 N.W.2d 202, 76 A.L.R.2d 1304 5

Swanson v. Baldwin, Iowa, 85 N.W.2d 576, 69 A.L.R.2d 249 5

Tarkington v. United States Lines Co. (2nd Cir. 1955), 222 F.2d 358 10

Taylor v. Robertson Petroleum Co., Kan., 137 P.2d 150 5

AUTHORITIES CONTINUED PAGE

Thompson v. Phillips, Ark., 284 S.W.2d 842 5
Title v. United States (9th Cir.), 263 F.2d 28 10
Tozer v. Charles A. Krause Milling Co. (3rd Cir. 1951), 189 F2d 242 13
Tsakomites v. Trans Pacific Carrier Corp., 322 F.Supp. 722 11
United States v. Oregon Lumber Co., 260 U.S. 290 4-5
U. S. v. Willis, Ark., 109 F.Supp. 456 13

STATUTES:

28 U.S.C.A. 1359 8

MISCELLANEOUS:

Moore's Federal Practice and Procedure, 3606, 3642 8
Rules of Civil Procedure, Rule 60(b) 4, 7, 10, 11, 12

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

COOK & CO., INC.,
Petitioner,

VERSUS

CLAUDIATTE PIERCE, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Respondents,

COOK & CO., INC.,
Petitioner,

VERSUS

STEPHEN ELLENWOOD, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

INTRODUCTION

The statement of the case set out by Petitioner is accepted and will not be repeated. Out of this factual background, the Court of Appeals for the 10th Circuit has granted Respondents' Motion and vacated their own judg-

ment under Rule 60(b)(6) remanding the case back to the Western District of Oklahoma for its consideration. Respondents have moved the trial court to vacate their own judgment in the light of the decision of the Court of Appeals to vacate and the reasons stated for doing that in their opinion. Respondents' Motion in the District Court had been stayed, pending action on Petitioner's Application for Writ of Certiorari in this Court.

The Petitioner raises four questions in their Brief as follows:

I. The Tenth Circuit improvidently usurped the discretionary authority of the trial court.

II. The Respondents failed to preserve any question for Rule 60(b) review.

III. A change in judicial precedent is an insufficient basis for 60(b) relief from a final judgment.

IV. The instant case presents no "Extraordinary Circumstance" justifying Rule 60(b)(6) relief.

To these questions Respondents submit the following counter-points.

I. The Tenth Circuit properly assumed jurisdiction in this cause.

II. The Doctrine of Election of Remedies is not applicable to this case.

III. Finality of judgment must yield to the interest of justice.

IV. The instant case is unique and justifies relief under Rule 60(b)(6).

In support of its counter-points Respondents submit short clarifying arguments.

I.

THE TENTH CIRCUIT PROPERLY ASSUMED JURISDICTION IN THIS CAUSE

Petitioner first asserts impropriety on the part of the Court of Appeals in accepting and acting on Respondents' Motion to Vacate. The procedural problem raised is, as the Court of Appeals indicated, one much discussed. Citing *Brady* v. *Beams*, 10 Cir., 132 F.2d 985, 986, *cert. denied* 319 U.S. 747; *National Brake & Electric Company* v. *Christensen*, 254 U.S. 425, 430; and *Butcher & Sherred* v. *Welsh*, 3 Cir., 206 F.2d 259, 262, *cert. denied* 327 U.S. 799, the Court of Appeals indicates that the trial court could well believe it is without power to determine a legal question contrary to the decision of the Court of Appeals. The *Butcher* case specifically held that while the Federal rules providing for relief from a final judgment enlarged the power of District Courts, it did not confer upon such courts the power to alter or amend a judgment which has been affirmed by the Court of Appeals. In the case here for consideration, the Court of Appeals had in fact affirmed the District Court, *Pierce, et al.* v. *Cook & Co., Inc.*, 10 Cir., 437 F.2d 1119, and a mandate had issued.

According to one view there is a "Judgment Rule" that prohibits a Federal District Court from departing without leave from the judgment of an appellate court once it has issued its mandate, *Greater Boston Television Corp.* v. *F.C.C.* (1971), 463 F.2d 268. In *Hartman* v. *Lanckli* (C.A. Mo. 1962), 304 F.2d 431, the Court concluded that the District Court could not, without the consent of the Court of Appeals, disturb a judgment of that Court. There is then

ample authority supporting Respondents' Motion to Vacate filed under Rule 60(b) in the Court of Appeals, and supporting the jurisdiction of that Court. Once accepting jurisdiction it was well within the power of the Court of Appeals to treat the substantive issue raised by the unusual circumstances of this case. Exercising its plenary powers the Court of Appeals held an *en banc* hearing and rendered an opinion dealing with the issues before them, remanding the case back to the District Court with directions, a time honored expedient preventing multiple appeals. The interest of justice seem well served by the acts of the 10th Circuit Court of Appeals particularly in a case where all the parties are conscious of the time span.

II.

THE DOCTRINE OF ELECTION OF REMEDIES IS NOT APPLICABLE TO THIS CASE

The Petitioner advances the theory that Respondents by asserting the applicability of the Motor Carrier Act in its initial appeal to the Court of Appeals elected an inconsistent remedy and cannot now vacate the judgment of that Court.

The doctrine of election of remedies is now largely an obsolete one, *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (10 Cir. 1962), 303 F.2d 527. Since the adoption of the Rules of Federal Procedure there is authority that it may not even be applicable in Federal cases, *Bernstein* v. *United States* (10 Cir. Colo.), 256 F.2d 697, *cert. dism'd* 358 U.S. 924. Mr. Justice Brandeis' dissent in the 1922 case cited by Petitioner, *United States*

v. *Oregon Lumber Co.*, 260 U.S. 290, is a telling attack on the doctrine and the more prevalent view today.

However, assuming the doctrine is still intact it would not apply in this cause. The essential elements of the doctrine are the existence of two or more remedies, the inconsistency between such remedies and a choice of one of them. *Thompson* v. *Phillips*, Ark., 284 S.W.2d 842; *Taylor* v. *Robertson Petroleum Co.*, Kan., 137 P.2d 150; *Gaines Brothers Co.* v. *Fourth National Bank*, Okla., 133 P.2d 742, 144 A.L.R. 1434. The election of remedies presupposes a right to elect. The facts must be such as afford the party a choice of remedies inconsistent in character, *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*. The fact that the remedy invoked was at the time unavailable precludes the application of the rule. A party is not barred from invoking a proper though inconsistent remedy when, in its first action, he has chosen and pursued, even to an unfavorable judgment, a remedy which was not available to him because either the facts tend to be different from when he supposed them to be or the law applicable to the facts was found to be other than supposed. *Swanson* v. *Baldwin*, Iowa, 85 N.W.2d 576, 69 A.L.R.2d 249; *State ex rel. Chaub* v. *Scottsbluff*, Neb., 100 N.W.2d 202, 76 A.L.R.2d 1304. One court has even said that inconsistency of remedies is not an inconsistency between the remedies themselves, which may often happen when the same facts are relied upon as the basis of the several alternative remedies, but means that a certain state of facts relied upon as the basis of a certain remedy is inconsistent with and repugnant to another certain state of facts relied

upon as the basis of another remedy. *Abdallah* v. *Abdallah* (Cir. 3, 1966), 359 F.2d 170.

Under the principles of the doctrine, an assertion of the applicability of the Motor Carriers Act in the Court of Appeals could hardly be described as a remedy respondent elected. At best it was a hypothesis which that Court rejected. The lower court had already rejected our cause on the basis of Oklahoma law which clearly stated that a shipper had no duty to third persons for the negligent acts of an independent contractor, *Marion Machine Foundry & Supply Co.* v. *Duncan*, Okla., 101 P.2d 813 (1940). At this point we had presented two theories both rejected and obtained no remedies at all. Then the *Davis* case specifically overruled *Marion* and presented the Court of Appeals with the unique situation with which we are now dealing. The real issue is not the largely obsolete doctrine of election of remedies but whether or not this is a case where the Court may vacate a judgment under specific rules designated to do that in an appropriate case. We seek now to re-assert our right to pursue the remedies state law makes available to one in Respondents' position. The question that the Court of Appeals properly considered is not whether we are barred because of some election of remedies but whether we are barred by a judgment which we seek to vacate.

III.

FINALITY OF JUDGMENT MUST YIELD TO THE INTEREST OF JUSTICE

Petitioner's third proposition relates to specific cases where courts have refused relief from the finality of a judgment. In virtually every one of these cases the party asserting Rule 60(b) could have obtained relief by the exercise of appellate remedies. In *Akerman* v. *U. S.*, 340 U.S. 193, 71 S.Ct. 209 (1950), the Court held that a freely made decision not to appeal a denaturalization judgment may not be excused by permitting recourse to Rule 60(b). Likewise in *Polites* v. *United States*, 364 U.S. 427, 81 S.Ct. 202 (1960), relief was denied under Rule 60(b) where the defendant made a deliberate decision not to appeal. However, the Court did state in the course of that opinion:

> "we need not go so far here as to decide that when an appeal has been abandoned and not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld where there has been a clear and authoritative change in governing law."

This dicta in *Polites* points to Respondents' case. No relief was possible to Respondents by appellate means. The relief they sought was only available in the State Courts from which they had been removed by Petitioner. Petitioner's argument that the matters here raised were or could have been litigated on appeal is not in accord with the facts. No appellate relief was available under the Erie Doctrine as the Federal Courts were bound to Oklahoma law. Neither is it clear that Respondents had available the same avenues

as Davis who dismissed his cause in the Federal District Court before judgment, acquired a non-resident guardian from Tennessee defeating diversity, and was thereafter able to secure a reversal of the *Marion* case in the Supreme Court of Oklahoma, *Hudgins* v. *Cook Industries, Inc.*, Okla., 521 P.2d 813 (1974). It should be noted that while criticizing Respondents' failure to exercise this stratagem, Petitioners nevertheless challenged it in *Hudgins* v. *Cook Industries, Inc.*, 310 F.Supp. 32 (1970). The Davis boy was rendered incompetent in the accident, but Respondent, Ellenwood, was competent and attained his majority in November of 1968 long before the District Court rendered summary judgment in December, 1969. The surviving widow, Pierce, might have sought the subterfuge of a Tennessee administrator, but the real question is not whether diversity might have been circumvented in both these cases, but whether or not Respondents have lost their right to trial in this cause by not seeking that circumvention by the appointment of a "straw person." The trend today is to eliminate the artificial creation and destruction of diversity jurisdiction and a growing number of Federal cases have neutralized attempts to create or defeat Federal jurisdiction by utilizing the anticollusion Statute, 28 U.S.C.A. 1359; *McSparran* v. *Weist* (Cir. 3, 1968), 402 F.2d 868; Moore's Federal Practice and Procedure, 3606, 3642.

Petitioners place reliance on *Collins* v. *City of Wichita* (Cir. 1958), 254 F.2d 837. The Court of Appeals pointed out the distinction between that case and this noting the decisional change there was in an unrelated case. Respondents have never asserted that a change in decisional law should reopen all cases decided under the old law. The re-

versal of *Marion* by a case (*Davis*) which was transactionally the same as *Davis* and out of which the death and injuries Respondents complained of arose in an extraordinary blend or coalescence of circumstance. A further distinguishing element of *Collins* was pointed out in *Polites* v. *United States, supra*, where the Court noted that a modification of that judgment would have retroactively disturbed existing property rights. Here no such rights are involved and the evidence has been carefully and fully preserved by depositions, interrogatories and other documents, all listed in Judge Eubanks' Findings of Fact and Conclusions of Law in the District Court's original Summary Judgment. The Petitioners' complaint concerning the passage of time is countered by the fact that the *Davis* case was only terminated by an Oklahoma District Court judgment on September 16, 1974.

Respondents assert that there are no failures on their part to pursue reasonable remedies. They were simply caught in the limbo between the dying of old precedent and the formulating of new.

IV.

THE INSTANT CASE IS UNIQUE AND JUSTIFIES RELIEF UNDER RULE 60(b)(6)

The case before the Court is more compelling as the Court of Appeals notes in *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25, 86 S.Ct. 153 (1965), for the reason that there two Federal Courts had differed as to construction of a Federal Statute while here in two cases arising out of the same transaction or occurrence, differing

results were reached by reason of the overruling of the *Marion* case by a case which was transactionally the same as Respondents' case, where relief was denied. In diversity cases the results in Federal Court should be substantially the same as those in State Court where litigation arises out of the same transaction. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 74-75. Here, the Court notes, they were not. In *Gondeck* the Court granted a rehearing out of time because "the interest of justice would make unfair the strict application of our rules" thereby granting persons injured in a common accident the same relief. Again Respondents' case is more compelling; no setting aside or overriding of existing rules need be granted here. Respondents cannot be faulted in failing to appeal as in *Akerman* or *Polites* or in *Title* v. *United States* (9th Cir.), 263 F.2d 28, nor have they failed to make appropriate procedural moves to obtain the right to trial accorded Davis.

While Rule 60(b)(6) has been considered sparingly by the courts there are several Federal cases where the rule has been invoked and where relief has been granted. In *Tarkington* v. *United States Lines Co.* (2nd Cir. 1955), 222 F.2d 358, the Court directed a verdict against a stevedore who did not then file a timely Motion to Appeal. Judgment became final. The Supreme Court then rejected in another case the doctrine on which the Judge rendered his initial decision. The Court indicated that while the trial court was correct in its original decision not to permit appeal out of time, the court should have treated the Plaintiff's Motion for New Trial as a Motion under Rule 60(b)(6). The appellate court granted relief and remanded the case for a new trial on the issue incorrectly determined.

There is a strong similarity between this case and Respondents' case but again Respondents' case seems more compelling. Respondents cannot be faulted for failing to appeal. In *Tsakomites* v. *Trans Pacific Carrier Corp.*, 322 F.Supp. 722, Rule 60(b)(6) was invoked. In that case plaintiff instituted an action under the Jones Act for injuries in 1959. In 1965 the Federal District Court held that plaintiff had insufficient contracts with the United States to successfully invoke the Jones Act. This was appealed to the Court of Appeals where an *en banc* hearing held against the plaintiff. Certiorari was denied in 1967. In 1970 the Supreme Court ruled that the Jones Act did apply to a sailor where the facts were identical (although not transactually the same as in Respondents' case). On the basis of this case, the United States District Court vacated a judgment five years old and due to the "exceptional circumstances" granted Tsakomites his day in court, vacating the judgment of March 23, 1965. In *Erick Rios Bridoux* v. *Eastern Airlines* (D.C. Cir. 1954), 214 F.2d 207, the appellate court affirmed relief granted the defendant from a very large default money judgment while at the same time denying him the right to prosecute his counter claim because he had failed to keep in touch with counsel. The appellate court indicated that the defendant's application to vacate the judgment against him had been addressed to the sound discretion of the trial court and its exercise could not be disturbed on appeal except for abuse. The relief granted was granted under Rule 60 (b)(6). In a case where time was the major issue, the Court in *Pierre* v. *Bermuth Lembcke*, 20 F.R.D. 116 (1956), granted relief under Rule 60(b)(6) where a personal injury had been suffered in 1948 and an action

commenced in that year. The plaintiff was committed to a mental institution in 1951 while the case was pending. The case was subsequently dismissed. The plaintiff was discharged in 1955 and more time lapsed while her attorney got in touch with her. In all, eight years had transpired when she instituted the Motion to Vacate the judgment. The Court awarded the relief noting the "grand reservoir of equitable power to do justice" and stating that while there was little doubt that the trial of the case would cause hardships on the defendant due to the lapse of time, the hardship should not prevent the plaintiff from securing a determination of her cause of action on the merits. The Court noted that the defendant could have protected itself by concluding investigation of the case and taking depositions. Again, the case does not seem any more compelling than Respondents' case. The Supreme Court has considered Rule 60(b)(6) in *Klaprott* v. *United States*, 335 U.S. 601, 369 S.Ct. 384 (1949), an immigration case. The Court there granted relief as the appellant was ill and in jail and there was no "neglect" on his part. The Court concluded that the language of the "other reason" clause of Rule 60(b) vests power in the Court adequate to vacate judgments wherever such action is appropriate to accomplish justice.

Rule 60(b) motion is addressed to the sound discretion of the Court, *Caribou Four Corners, Inc.* v. *Truck Insurance Exchange* (10 Cir.), 443 F.2d 796, 799, and it would be difficult to state that the Court of Appeals, after consideration and reconsideration at an *en banc* hearing in Respondents' cause, did not exercise sound discretion under these facts. The Court acts out of "the grand reservoir of equitable power to do justice in a particular case" and the

further guide that discretion should ordinarily incline toward granting rather than denying relief where no actual injustice will ensue. *U. S. v. Willis*, Ark., 109 F.Supp. 456; *Tozer* v. *Charles A. Krause Milling Co.* (3rd Cir. 1951), 189 F.2d 242.

CONCLUSION

This is an exceptional case that involves multiple suits and different forums arising out of one life-shattering accident and the reversal of long-established precedent in a State Court after judgment in a Federal Court based on Oklahoma law. As such it is an unusual coalescence of circumstance. The Court of Appeals reasonably exercised its jurisdiction under its commitment to a liberal construction of Rule 60(b). That jurisdiction was properly invoked by Respondents and certiorari should be denied.

Respectfully submitted,

PHIPPS, JOHNSON & HOLMES
KENT C. PHIPPS
Security Bank Building
P. O. Box 1059
Ponca City, Oklahoma 74601
Attorney for Respondents

October, 1975